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Washington Letter

Monroe Doctrine Made Statutory

ENACTMENT of the substance of the Monroe Doctrine has been accomplished. Congress, on June 18, 1940, passed House Joint Resolution No. 556, sometimes called the Hemisphere Bill, which declares:

1. That the United States would not recognize any transfer, and would not acquiesce in any attempt to transfer, any geographic region of this hemisphere from one non-American power to another non-American power; and

2. That if such transfer or attempt to transfer should appear likely the United States shall, in addition to other measures, immediately consult with the other American republics to determine upon the steps which should be taken to safeguard their common interests.

The timeliness of this action renews our interest in the text of the original Monroe Doctrine. It was enunciated in President James Monroe's seventh annual message to Congress, December 2, 1823; and its different parts appeared at several places in that message. The portion which comes nearest to stating in one place the substance of the Doctrine is quoted on this page and reproduced on page 551. It is from one of the three original texts, the copy (made by a clerk but signed by President Monroe) which was sent to the House of Representatives. Another copy, sent to the Senate, is now in the National Archives; and a third copy is in the Department of State.

The substance of the Monroe Doctrine was separated, in Monroe's message, into three parts, although they are somewhat run together in the text of the message. There is the portion countering Russia's attitude of aggression in Alaska (long prior, of course, to its acquisition by the United States, which was not until 1867); the portion forestalling the threat of interference in South America by Europe's Holy Alliance or some of its members (this being the "allied powers" to whom Monroe refers); and the portion of the message declaring generally the isolation doctrine of the United States. The pervasiveness of the Monroe Doctrine in our history is indicated by the statement of James Bryce, in 1894, that "the idea that the United States is entitled to forbid any new establishment by any European power on its own continent" constitutes "the one fixed principle of foreign policy which every party and indeed every statesman professes."

President Monroe addressed the two houses of Congress as: "Fellow Citizens of the Senate and House of Representatives." He had spoken in the message of the efforts, of the United States and the Russian Imperial Government, through the ministers of the two countries, "to arrange by amicable negotiations the respective rights and interests of the two nations on the northwest coast of this continent" (Alaska), and noted that such negotiations and discussions were judged a proper occasion "for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers."

Text of Doctrine

In this historic message, President Monroe recounted statements made at the commencement of the previous session of Congress, as to a great effort "then making in Spain and Portugal to improve the condition of the people of those countries" which at that time appeared to be conducted with extraordinary moderation. He remarked, however, that "the result has been so far very different from what was then anticipated," and continued: "Of events in that quarter of the globe, with which we have so much intercourse and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments: and to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted."

The message of President Monroe continues with the portion herewith reproduced from the original text as follows: "We owe it therefore to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere, as dangerous to our peace and safety. With the existing colonies or dependencies of any European Power we have not interfered, and shall not interfere. But with the Governments which have declared their independence and maintained it, and whose independence we have, on great consideration, and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as a manifestation of an unfriendly disposition towards the United States."

The text (not given in the photostat) continues: "In the war between those new Governments and Spain, we declared our neutrality at the time of their recognition, and to this we have adhered, and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security."

The message referred to late events which "shew that Europe is still unsettled"; noted that the "allied powers" had "interposed by force in the internal

concerns of Spain"; and said that the extent to which such interposition may be carried "is a question in which all independent powers whose governments differ from theirs are interested, even those most remote, and surely none more so than the United States."

The so-called isolation policy of the United States, as set forth in Monroe's message was expressed thus: "Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same which is, not to interfere in the internal concerns of any of its powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting in all instances the just claims of every power, submitting to injuries from none. But in regard to these continents circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition in any form with indifference. If we look to the comparative strength and resources of Spain and those new Governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other powers will pursue the same course."

Historical Background

A better understanding of the Monroe Doctrine may be had by observing a little of its background. Some months before Monroe's Message, and on August 20, 1823, a "private and confidential" letter to the United States minister to Great Britain, Richard Rush, was written by the British prime minister, George Canning. Among other things, he expressed the view that the recovery of her American colonies by Spain was hopeless; that Great Britain did not aim at possession of any portion of them; but that she "could not see any portion of them transferred to any other Power, with indifference."

Canning, by this letter, sought to induce Rush to negotiate with him toward having their two governments intimate, by a declaration, their "joint misapprobation of such projects" as that of any European power which might look to "a forcible enterprise for reducing the [Spanish American] colonies to subjugation, on the behalf or in the name of Spain; or which mediates the acquisition of any part of them to itself, by cession or by conquest." He concluded with the argument that, "I am persuaded, there has seldom, in the history of the world, occurred an opportunity when so small an effort of two friendly Governments might produce so unequivocal a good and prevent such extensive calamities."

This effort of the British prime minister was aimed at what he believed might be the aggressive intentions of France. Later he was assured by Prince Polignac that France would not, under any circumstances, act against Spain's former colonies by force of arms. Canning, satisfied with this understanding, did not press his idea of a joint declaration with the United States.

The United States made no response to Prime Minister Canning's proposals, for two reasons: first, because they did not involve recognition of the Latin American Republics; and second, because Secretary of State John Quincy Adams felt it would be better not "to come in as a cock-boat in the wake of the British man of war."

Appreciation is here expressed for portions of the above material to Dr. St. George L. Sioussat, in charge of the Manuscript Division of the Library of Congress; to Dr. Henry Steele Commager, of New York University, through his Documents of American History, Croft's American History Series, 1934; and to Richardson's Messages and Papers of Presidents, vol. II, 1896, Government Printing Office.

Washington and the War

When a nation is ninety per cent, or more, heartily in favor of one side in a deadly war, but at the same time is almost equally in favor of keeping out of the war, an impossible burden is imposed upon its repesentatives or agents in charge of its government. They are expected to "do something about" two decidedly inconsistent desires of their constituents; to do it at once; to do it so as to make the right side win; and to keep everybody entirely free from blame in the end, no matter how the war turns out.

Wherefore, we need not be too surprised if certain fictions are maintained and various asides are uttered to placate our ostensible views. We vote five billion dollars as one year's defense appropriation and then enact a two billion dollar supplemental defense appropriation. We devise an emergency tax bill to raise one billion dollars annually for five years, it being intended for use in paying off the four billion dollars of bonds known as the "National Defense Series" which will raise the Government's debt limit to forty-nine billion dollars.

We give additional powers to the Executive and withhold other powers. We talk of keeping Congress in session permanently during Europe's emergency; or is it our emergency, and, if not, when will it become that?

But we are keeping out of this war. We are the complete masters of our own fate and therefore *we* will not be drawn into a war against our will.

Naturalization Administrator

The naturalization service, lately transferred from the Labor Department to the Department of Justice, has been placed under the administrative control of Major Lemuel B. Schofield, as Special Assistant to the Attorney General. Major Schofield is from Pennsylvania, having been, formerly, first assistant District Attorney in Philadelphia; later Director of Public Safety of Philadelphia; thereafter in the practice of law; and, more recently, professor of Criminal Law at Temple University School of Law.

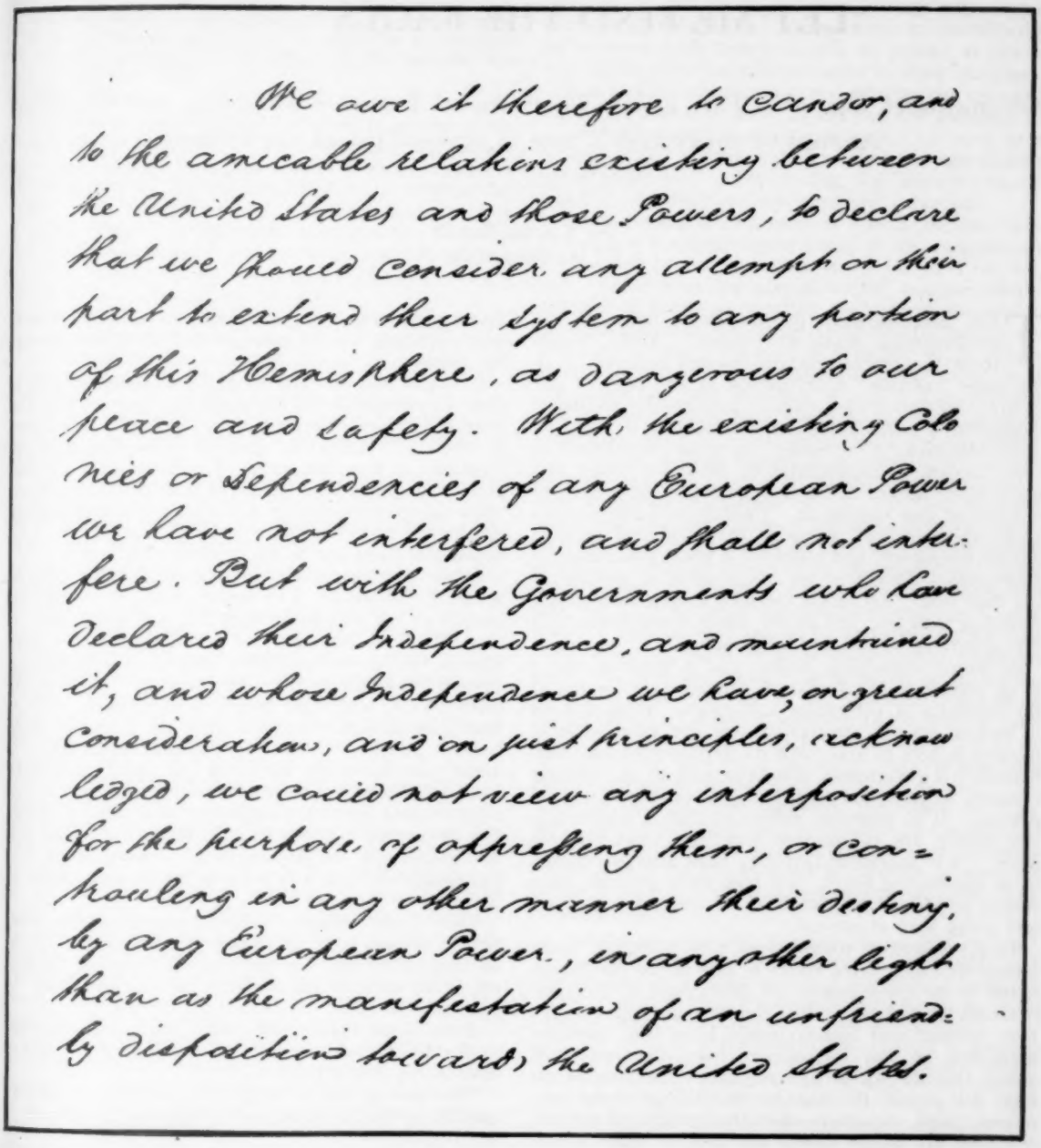
Judge Green Retires

Judge William R. Green, of the United States Court of Claims, upon his request therefor, was retired, effective May 29th. By an order of the same date he was made an active member of the Court to hear and determine questions arising in cases heard by him during the June and October, 1940 terms of the Court. Judge Green is 84 years of age and has served on the Court of Claims since 1928. Prior to that time he served in Congress since 1911; and before that was judge of a State Court in Iowa since 1894. His home in Iowa was at Council Bluffs. He was born in Colchester, Connecticut; was admitted to the Illinois bar in 1882; and shortly thereafter began the practice of law in Iowa.

Judge Green was a Republican and appointed to the Court of Claims by President Coolidge. Upon the occasion of accepting his resignation to retirement status, President Roosevelt said: "Permit me to express my appreciation of your long and faithful service as a member of the judiciary, and to extend to you my best wishes for your health and happiness."

Congressman Jones to Court of Claims

Representative Marvin Jones, of Amarillo, Texas, has been appointed and confirmed by the Senate to fill a vacancy on the Court of Claims, left by the death, early in April, of Judge Thomas S. Williams. In view of the war situation, it was desired that Mr. Jones continue his duties in Congress, which he has decided to do until the



We owe it therefore to candor, and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any portion of this Hemisphere, as dangerous to our peace and safety. With the existing Colonies or Dependencies of any European Power we have not interfered, and shall not interfere. But with the Governments who have declared their Independence, and maintained it, and whose Independence we have, on great consideration, and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controuling in any other manner their destiny, by any European Power, in any other light than as the manifestation of an unfriendly disposition towards the United States.

end of his present term. He plans, thereafter, to take the oath and assume the duties of a judge of the Court of Claims.

Mr. Jones has been in Congress for twenty-four years, and is Chairman of the Agriculture Committee. He was admitted to the bar in 1907. While practicing law at Amarillo, he was, in 1913, appointed Chairman of the Board of Legal Examiners, for the Seventh Supreme Judicial District of Texas. He entered Congress in 1917; and thereafter has been reelected to each succeeding Congress.

The suit by Grover C. Bergdoll, World War draft dodger, to obtain all of the $500,000 estate which the Government had seized from him was thrown out of the District Court of the United States for the District of Columbia by Justice Jennings Bailey, upon a holding that he had lost the right to get back his property in full, having forfeited his citizenship and other rights when he deserted from the Army in time of war.

The Government will allow Bergdoll about 80 per cent of his property, less certain deductions. It was explained by Francis J. McNamara, Special Assistant to the Attorney General, that 20 per cent of the value of the estate will be placed in the German special deposit account in the Treasury to pay American citizens who have valid claims against Germany from the first World War. Besides this, the Government will deduct 2 per cent for administrative purposes and withhold $200,000 for income taxes. The remainder, if any, will be handed over eventually to Bergdoll who now is serving a three to seven year sentence in prison at Governors Island, New York.

"LET ME FIND THE FACTS . . ."

Administrative Law as a Part of our Governmental Process — Misgivings and Opposition Aroused by it—Process is here to Stay—What of the Future?

By Laird Bell*
Of the Chicago Bar

THE administrative process bulks large in our governmental machinery today. Many things about the process disturb lawyers brought up in the older tradition. Combination in one body of executive, legislative and judicial powers offends them; delegation to small boards of wide powers to legislate, under standards of increasing vagueness, curtailment of court review of administrative decisions—these and many other factors of the new procedure have aroused misgivings and opposition. Defenders of the process plead the practical necessity for expedited governmental machinery, and claim for it great advantages in expertness. Objectors are swept aside as apostles of old fogeyism. Yet doubt persists among many men, including men who are on the whole sympathetic with the objectives of the new legislation.

A major underlying doubt—and a growing one—is in regard to the fusion in certain commissions of the functions of prosecutor and judge. What follows is written on the assumption that the administrative process is here to stay, that its development has been necessary if government is to cope with an increasingly complex society, and that it is on the whole a good process. It is, however, submitted that if administrative boards are to function well they must function fairly. It is submitted that they must also be believed to be functioning fairly. On both these grounds there should be greater separation of the roles of prosecutor and judge than at present.

In the scores of commissions now operating under federal and state laws, issues of fact in complaints initiated by the commissions are determined by the commissions themselves. Often the facts are heard in the first instance and findings made by a trial examiner appointed by the commission from its own staff. While the trial examiner's report on the facts is not final, it is usually the basis for the findings of the commission itself. In many cases the findings of the trial examiner are purely formal and involve issues largely uncontested. But in an increasing area the findings are far from formal and the issues are bitterly contested. With each new commission this area is enlarged, and when it comes to fields surcharged with emotional bias, such as that of the National Labor Relations Board, the impartiality of the fact-finding agency becomes a matter of real moment.

It is a fundamental concept of justice that no man shall sit in judgment upon his own case. At any rate many of us had supposed so. It now appears from the writings of some of the more ardent advocates of the administrative process that this was just a platitude tossed off long ago by Lord Coke—a "time-worn dictum," which presumably no longer has validity. Some observations on the subject may still be permissible, however, on the assumption that the dictum still has merit.

It is probably too late to insist on complete separation of prosecution and judgment in commissions. The commission form of agency is too thoroughly established to make it practical to question some fusion of the functions at this late date. The blessing of the Supreme Court has been conferred with increasing fervor upon the constitutionality of the administrative process, despite the fusion of functions, and it is hardly to be hoped that there can be any turning back now.

Other considerations than constitutionality may be weighed, however. The device may be within the powers of the legislature and still lack perfection. It may offend no constitutional prohibition when a commission with power to initiate complaints hears its own counsel prosecute its own complaint and solemnly decides that it was right when it complained. But it may nevertheless offend the sense of justice of some worthy people. Gilbert & Sullivan immortalized a device like that when the Lord Chancellor in Iolanthe passed on his own application to marry his ward. Those old-fashioned writers thought the idea funny. Today it is apparently a device of efficiency. But it may still be thought that the arrangement is not a sound one, and specifically that it is not wise for the commission to find its own facts.

Chief Justice Hughes crisply summarized the situation in saying, "An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country and I care little who lays down the general principles.'"

Even Dean Landis, who may perhaps be regarded as the leading advocate of the administrative process, said, in his Storrs Lectures:

"No one can fail to recognize that there are dangers implicit in this combination of functions in an administrative agency."

In Great Britain, where no constitutional issues are involved, but the principles of natural justice are nevertheless respected, this issue has been actively debated in recent years. The Committee on Ministers' Powers, which formulated the so-called Sankey report in 1936, criticizes the fusion of functions of prosecutor and judge, and makes a further point as to the nature of the interest which disqualifies the judge from passing upon his own case.

> "Indeed we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. No honest man acting in a judicial capacity allows himself to be influenced by pecuniary interest: if anything, the danger is likely to be that through fear of yielding to motives of self-interest he may unconsciously do an injustice to the party with which his

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pecuniary interest may appear to others to identify him. But the bias to which a public-spirited man is subjected if he adjudicates in any case in which he is interested on public grounds is more subtle and less easy for him to detect and resist."

The preliminary report of the Attorney General's Committee on Administrative Procedure is also interesting on this question. This Committee was formed after the Walter-Logan Bill became a serious possibility in Congress. It was appointed to investigate and report, and its preliminary report is entirely of a soothing nature. It deprecates most urbanely all hurry and precipitate action. But it recognizes that perhaps all is not completely well in regard to the subject-matter here under discussion. It says:

"The Committee believes that among its most important subjects of investigation are the position of the trial examiner, the personnel filling that position, the limitations which the classification of the position and the resulting salaries have imposed upon obtaining qualified men, and the relationship of the trial examiner to the case which he has heard *and to the agency which he has served.*"

The Circuit Court of Appeals for the 7th Circuit, in setting aside an order of the National Labor Relations Board on the appeal of the Inland Steel Company, said of one of the points involved:

"It also illustrates, in a minor fashion, what this record, as a whole, convincingly discloses—that is, the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury and executioner."

It may not be unfair to regard Dean Landis' justification of this fusion of functions as the authentic defense of the administrative enthusiasts. After stating,[1] as above indicated, that there are dangers implicit in the combination of functions, he argues that what is missing is merely the traditional check upon prosecution, and that actually there are still many checks upon abuse. For example, he points out that the administrative process moves in a narrow field and does not deal with matters involving human sympathies intimately. The necessity of recording findings of fact is said to constitute an automatic corrective. He points out that "a certain professionalism of spirit" has developed, without, however, making it very clear that this brings about unbiased judgments. He declares that the process must be giving satisfaction because it has grown so rapidly in recent years. He goes one step further and insists that the process is vindicated because the judicial review has been narrowed in recent laws rather than broadened. "In other words, the protest of the theorists against the absence of checks is contradicted by the course of practical legislative judgments which are limiting the checks that now exist." It seems that the old-timers that liked checks and balances have now somehow become theorists.

Dean Landis concedes that the process is susceptible of abuse and that it is more susceptible to interference from members of the executive and legislative departments than similar proceedings in a court, owing largely to the traditions protecting the courts. He points out that the trial examiners' staffs have on the whole too little competence and are not adequately paid; also that the members of an administrative agency are over-worked and have to delegate a great deal of their work to examiners. But he winds up:

"Despite disadvantages such as these, the net balance would still seem to favor leaving adjudication with the administrative. The necessity for coordinating enforcement with policy is still so urgent as not to lead lightly toward the divorcement of these functions."

It is hard to suppress a query whether any prosecuting officer has ever failed to feel that the necessity for "coordinating enforcement with policy" is very great indeed. Lord Jeffrey was very efficiently coordinating enforcement and policy during the Bloody Assizes. But the precedent has not been well regarded.

When the realm of dispute is in such technical matters as are involved before many of the commissions, it may well be that the effect of the fusion is not very bad. So long as the administrative determination is confined to questions of unfair methods of competition, or what might be the public convenience, interest and necessity in radio, or even what might be in the interest of consumers or investors in public utility holding companies, the decisions are as a rule probably not, as Dean Landis says, "open to the broad range of human sympathies." But increasingly the administrative process is being extended to areas which are not so technical and lacking in human appeal. Human interest certainly attaches to the controversies with which the National Labor Relations Board is required to deal. It is more than a coincidence that the attacks upon the fusion of functions of prosecutor and judge have grown in intensity since this Board began to function. If we could feel confident that the administrative process were not to be extended further into such fields, we might be more philosophical about the situation. But increasingly the creation of an administrative board seems to be the legislative solution of hard problems. When a situation is too hot for Congress to handle, statesmen create a board, tell it to do the right thing, and hurry on to the really serious business of getting reelected.

In the light of these problems, the Board of Managers of the Chicago Bar Association has adopted a proposal recommended by its Committee on Administrative Law which is designed to promote greater impartiality in the original determination of facts. The proposal is brief:

"We recommend that, in consideration of the Walter-Logan bill now pending in Congress, or in additional legislation, the present method of determining issues of fact in adjudicative proceedings initiated by administrative agencies themselves be radically revised.

"The value of the administrative process in government is recognized. The need for prompt and expert determination of issues of fact in administrative cases is recognized. But the necessity for having the facts determined with practical finality by the agency which is in control of the prosecution is not recognized.

"Typically, such an agency assigns trial examiners from its regular staff to hear testimony and to report findings of fact. With these findings before it, the agency determines the facts. Its determinations are to a high degree conclusive. If supported by substantial evidence, the facts as found by the agency cannot be questioned on any appeal. The need for review of questions of fact is less if the machinery for the determination of facts inspires confidence; it is greater if it does not. When a prosecuting agency with its own staff determines the facts upon which the agency bases its orders, the proceeding does not command confidence.

"We recommend that, with respect to all administrative agencies which exercise adjudicative functions and have power to initiate complaints, a panel of trial examiners be created, selected for general competence, adequately paid, and protected in long tenure of office; and that appointment, and assignment of trial examiners to

1. "The Administrative Process," Yale University Press 1938.

particular cases, be made by someone other than the prosecuting agency. With due regard to special competence in particular fields, trial examiners should be available for such proceedings in all designated agencies and not confined to any single agency.

"The agency should not be required to accept the findings of fact of the trial examiner, but as to any issue of fact in which the findings of the agency and trial examiner are not in accord, court review should be without presumption in favor of either. There should be no court review of an issue of fact upon which the trial examiner and the agency agree, if the findings on such issue are supported by substantial evidence. In the occasional case where no trial examiner is used the entire record should be reviewable on appeal."

This proposal is designedly general in its terms. If the general scheme for effecting greater independence for the trial examiner is desirable, the details can easily be filled in later. By what agency he should be appointed, by what agency assigned to cases, what should be his salary and his term of office, whether he should be appointed like members of the Board of Tax Appeals, the independence and competence of which have attained general acceptance—these and many similar questions may be passed for the present. The important thing at this stage is to decide whether the trial examiner should be given an independent status.

That most trial examiners in most cases are impartial may readily be conceded. But it is mere common sense to recognize that under the present scheme of trial examiners no man can wholly rid his mind of a consciousness of where his pay-check comes from and to whom he is beholden for his job. No great dignity now attaches to the office of an examiner, and there is little about the nature of the work to attract a high degree of ability and independence to the job. If an examiner were given something of the standing of a branch of the judiciary, his dignity and independence would be enhanced and able men would be attracted. At present examiners, like members of the boards themselves, get no protection from any of the traditions of detachment that custom has built up around the judiciary. Examiners are just plain folk working in the same office as the prosecutor. While there may in some commissions be office rules against consultation between the examiner and the lawyer who is trying to make a record, they are not such taboos as those which keep an advocate from consulting a judge during the course of a case.

"Professionalism of spirit" may work in the reverse. An ominous item appeared in the investigation by the Smith Committee of the House of Representatives investigating the work of the N.L.R.B. The trial examiner in the proceeding of that board against the Inland Steel Company wrote the chief trial examiner during the hearing: "Sol (the attorney for the board) apparently is well satisfied the way the case is going, including the record up to and including the staged walking [out] of yesterday. I too am satisfied, Nat, that you have a good record. I'm taking no chances, and so far as I'm able you'll continue to get a good record." The findings of such a trial examiner may possibly be objective, impartial and fair, but it is hard to feel confident that they will be *believed* to be so.

The proposal of the Chicago Bar Association is by its terms applicable to all federal agencies, provided they initiate complaints. This proviso probably eliminates a large part of the one hundred thirty odd administrative agencies in the federal government. On the other hand, the recommendation would apply to most of the conspicuous agencies and those exercising the largest powers. The proposal could be adopted without any material impairment of the day to day operation of such agencies. There may be reasonable difference of opinion on whether there should be one panel of examiners for all boards. The Bar Association's conclusion was that while consideration should be given to special qualifications of examiners by the agency which assigns them, there should be a single panel for all commissions. Certainly to the extent that it is desirable to divorce the trial examiner from the bias of the particular commission, this decision seems sound.

It is hard for the mere practitioner, not indoctrinated with the zeal that seems to possess those associated with the commissions, to see what valid objection can be made to the proposal. It is hard for him to see why an examiner appointed and assigned and protected in his tenure as recommended would not be at least as competent as the present type of examiner. It is hard for him to see why any commission that is trying to do a sincere job should not prefer, and greatly prefer, to have facts determined by an impartial person. Some mysterious spirit seems to take possession of those charged with administering a board. They become crusaders and a holy ardor inspires them. Because their hearts are pure they feel strongly the "necessity for coordinating enforcement with policy." They forget that their successors may not be so starry-eyed, and that such institutions last a long time after the first fine frenzy of the crusade is past. Public utility commissions which started a short time ago with high purposes have not always been free of reproach in later years. In recent administrations, when many new governmental agencies have been establishing themselves, devoted men have been blazing new trails. It has been natural for them to resent anything that hampers their work, even obdurate facts that don't quite fit their plans. The sincerity of these advocates of the administrative process commands respect. But one can't resist a feeling that their judgments are warped by their zeal, and that they would not be so devoted to coordinating policy and enforcement if some less consecrated apostles were administering the agency.

Advocates of the administrative process with a longer view might well be content with less "coordination." If the work of the agency is worth doing, it is worth doing in a way that inspires confidence. So long as the agency is in a position to make its facts fit its preconceptions, that confidence will be withheld. It would seem worth while to take steps to enhance such confidence. It is submitted that the Chicago Bar Association's proposal is a practical step to that end.

Low-Cost Law Service Projects Disapproved

Because it can not accept the premise that large numbers of people can not get legal service or can not obtain it at a reasonable price, a committee of the Wisconsn State Bar Association, in its Report to the June meeting of the Association, is unable to go along with the legal service bureau or neighborhood law office idea.

Members of the committee are satisfied, the report says, that legal services are available to all and that the lawyers of Wisconsin are not only rendering service at reasonable rates but are giving their services without charge where the circumstances warrant.

Visit of American Bar Association to Paris in 1924

We reprint herewith from our November 1924 issue a picture of five illustrious men who came together in Paris to celebrate in their respective representative capacities the kinship of French and American law and the friendship and fraternity existing between the bar of France and that of the United States.

There were Millerand and Poincaré, two ex-presidents of the Republic of France; Batonnier Fourcade, the titular head of the Paris bar; Charles Evan Hughes, the then President of the American Bar Association; and Myron T. Herrick, the Ambassador of the United States. Many of you who look upon that picture will remember the happiness of that occasion. Those of our hosts who still survive will remember it with anguish of spirit.

Those of us who made the joyous pilgrimage to Paris and heard the gracious eloquence of our leader, now Chief Justice of the United States, doubtless remember that wonderful and inspiring memorial to the valor and loyalty of the French lawyers which stood in the historic room called "The Hall of Lost Footsteps." There the figure of a man in the distinctive robes of the French advocate knelt before the Angel of Justice, who tendered him a sword, and to the angel were ascribed the words:

"Justice Arms Her Sons."

It is the hope of every man and woman in this fortunate land of ours, that war will not come to us, as it has to France. But if war comes the lawyers of the United States, as the lawyers of other democracies, will know how to defend our liberties and our democratic way of life.

"RESTRAINT OF TRADE"

[The American Medical Association Case]

By Walter P. Armstrong
Of the Memphis Bar

THE Supreme Court has denied certiorari in the case of *United States v. American Medical Association, et al.* This refusal to review the decision of the Court of Appeals of the District of Columbia means that there will now be a trial on the merits. Prior to that time comment upon the probable outcome would be improper.

However, the opinion of Chief Justice Groner of the Court of Appeals, thus sanctioned by the Supreme Court, settles the law of the case and it is to that phase that attention is directed.

There has been some confusion as to what is precisely involved in the case. An examination of the record, briefs and opinion discloses that the issues are easily understandable.

The American Medical Association, the Medical Society of the District of Columbia, Harris County Medical Society (Houston, Texas), Washington Academy of Surgery and certain doctors, who were officers of one or the other of these organizations, were indicted for conspiracy to restrain trade in the District of Columbia in violation of Section 3, of the Sherman Antitrust Act.

In that section Congress, in the exercise of its plenary power to legislate for the District, has declared that "every contract, combination in form of trust, or otherwise, or conspiracy in restraint of trade or commerce in . . . the District of Columbia . . . is hereby declared illegal." The inclusion of the Texas Association and the individual defendants living without the District is based upon the fact that they are charged with participating in an alleged conspiracy initiated and consummated within the District.

The gravamen of the charge is that the defendants conspired to impair or destroy the business and activities of Group Health Association, Inc., a non-profit cooperative association for the provision of medical care and hospitalization to its members and their dependents.

As alleged in the indictment, Group Health is an association of employees of certain executive departments of the Government employed in the District, eighty per cent earning annual incomes not over $2,000.00. It provides medical care and hospitalization to its members and their dependents on a risk sharing prepayment plan, its funds being collected in the form of dues. Medical care is provided by a medical staff, consisting of salaried physicians under the sole direction of a medical director. A clinic and limited hospitalization are furnished. The indictment alleges that the personal relationship usually existing between doctor and patient exists between Group Health doctors and Group Health patients.

It is alleged that the American Medical Association and the District Society, by disciplining their members, possess the power to exclude a doctor, disapproved by them, from attending his patients in any Washington hospital and that, by enforcing their rules of ethics, they may deprive their members of the privilege of consulting with disapproved doctors.

It is charged that this power was exercised to prevent any doctors employed by Group Health from sending patients to a Washington hospital or from calling into consultation any member of the defendant associations. This, it is claimed, was a conspiracy to restrain doctors in the District in the pursuit of their calling and to restrain the hospitals in the operation of their business and to destroy Group Health in the performance of its functions.

It is pleaded that the alleged conspiracy had as its background the long continued policy of opposition on the part of the American Medical Association to risk-sharing plans for medical service, growing out of the fear of its members of business competition from doctors connected with such organizations.

District Judge Proctor sustained a demurrer to the indictment on the principal ground that the practice of medicine is not a trade within the meaning of Section 3 of the Sherman Act.

The Court of Appeals reversed. That court held that "restraint of trade" as used in the Act had its common law connotation—the restraint of one in any calling by which he earns a livelihood. Quoting an opinion by Chief Justice White, it pointed out that the expression had been ordinarily used by courts when dealing with contracts by which a doctor voluntarily restricted his right to practice within a certain area.

Judge Groner said:

> "We must hold that a restraint imposed upon the lawful practice of medicine,—and *a fortiori*—upon the operation of hospitals and of a lawful organization for the financing of medical services to its members, is just as much in restraint of trade as if it were directed against any other occupation or employment or business."

Judge Groner was careful to add:

> "If there is any justification for the restraint, so as to make it reasonable as a regulation of professional practice, it must be shown in evidence as a defense. . . . Organizations and rules which have as their purpose the improvement of conditions in any particular trade or occupation, and the regulation of relations between traders, are, as we have just pointed out, beneficial rather than detrimental to the public interest."

As the law now stands it is simply this: In the District of Columbia, where the Sherman Act has its widest scope, a profession is not *per se* exempt from its provisions. These provisions may be violated by an improper use of the regulation of the profession. This does not mean that a profession may not adopt and enforce proper standards of ethics. The adoption and enforcement of such standards, so the Court of Appeals declares, not only benefits the profession but works for the public good.

PHILADELPHIA MEETING

An Interesting and Historic City

By Joseph Jackson
Author of Literary Landmarks, etc.

AS IS SO often true, it is the visitor to Philadelphia who most generally appreciates the glories of the city's Fairmount Park and of its Benjamin Franklin Parkway; the Philadelphian too often takes them as a matter of course, but the element which neither visitor nor citizen thoroughly realizes is the magnitude of these two enterprises. Nothing quite so daring in the way of civic improvement and adornment has ever been undertaken by any American city —and perhaps that qualifying adjective could be omitted.

Philadelphia's park was not originally planned as it now exists; like Topsy, it just grew. Begun by the purchase of five acres a century and a quarter ago as a site for waterworks, it is today probably unequalled in size, as it is in natural beauties, by any municipal park in the Western World.

More than 150 years ago, wealthy merchants of the city established their country seats or summer residences within the limits of Philadelphia County on the banks of the picturesque Schuylkill River. In order to avoid the heat of the summer season, these wealthier inhabitants, like the ancient Romans, fled to estates in the environs. Traveling being difficult and uncomfortable in those days, such summer exiles selected places which could be reached by comparatively easy journey from the city. Some of these estates were beautiful in the architecture of their mansions and in the rustic attractions of their grounds.

About seventy years ago, the suggestion that these properties should be purchased and combined into a public park was received with favor, despite the fact that the project was regarded as an audacious one; as a matter of fact, it involved a sort of municipal courage unprecedented in this country. More than twenty major estates and many smaller parcels of land were purchased at that time and incorporated into a magnificent park which, during this period, was for the first time comprehensively planned. Some of the buildings included in the present park date from the eighteenth century and their fine Colonial character impress everyone who sees them; nearly every one has a romantic history. The park as thus projected had an extent of five and a half miles along the Schuylkill River and seven and a half miles up the enchanting Wissahickon Creek, a source of inspiration for painters and poets. Poe lived near the original Fairmount Gardens and spent many a summer evening on the grassy slopes of the old Fairmount Reservoir (now the site of the imposing Art Museum) enjoying the peace and beauty of the scene. He wrote at least one article on the Wissahickon.

The movement to acquire this vast property as a park was started none too soon, for some of the older estates were already being offered for real estate development. An act of the legislature was obtained, however, providing for appropriation of the ground by the city for public purposes and leaving the amount of compensation to the usual procedure. Those charged with the duty of acquisition did a thorough job, taking the banks and adjoining properties on either side of the river.

Among the properties thus acquired was one of the last remnants of the Penn estate in Philadelphia—the curious and charming little home of the bachelor poet, John Penn, who tried so hard to become an American. Finally, failing in his effort to secure adequate compensation from the State Legislature for his family estates which had been confiscated at the Revolution, he returned to England. His home, which he called The Solitude, is now the administration building of the Zoological Gardens. On at least one occasion, Washington visited him there.

Washington was a visitor also more than once at other mansions now within the limits of the park. He was a guest of Judge Peters at Belmont, the oldest house within the present park limits, and would ride out to see his friend, Robert Morris, at Lemon Hill—although the great financier himself called his estate The Hills. Lansdowne today is only a name on the map. The site of this house which became the property of the Baring family (Lord Ashburton) disappeared long ago and its site is now marked by Horticultural Hall, one of the exhibition buildings constructed for and bequeathed to the park by the Centennial Exposition of 1876. Among the distinguished occupants of Lansdowne was Joseph Bonaparte, one time King of Spain.

Mount Pleasant in the East Park is probably the best example of a pre-Revolutionary mansion in Philadelphia. John Adams after dining there, wrote that it was the most elegant seat in Pennsylvania. Interest attaches particularly because General Benedict Arnold bought the property as a wedding gift for his bride, Peggy Shippen. Characteristically, he appears never to have made settlement and as a consequence, never lived there. Since, however, this did not make a romantic story, novels have been written describing Arnold and his bride as living their stirring lives on this estate, and even guide books have stated it as a fact. Baron von Steuben lived in Mount Pleasant in 1781.

The Wissahickon Creek enters the Schuylkill River about five miles above the old Fairmount Water Works, now the Aquarium. Its scenery is of that picturesque and rugged nature which so appeals to lovers of the forest primeval, with its stretches of dark wood, its "rocky steep and darksome defiles" and its "deep ravines and shadowy glen." Like the greater part of Fairmount Park, this section is unspoiled by ambitious landscape gardeners or engineers. Only such necessary improvements as modern roadways, lighting, and here and there a bridge have disturbed the primitive character of this beautiful valley.

As one rides along the Lincoln Drive, he will observe a quaint, indescribable little group of buildings,

unpretentious in appearance, bearing a tablet which notes that David Rittenhouse, the first great American astronomer, was born there. A little farther along, a small brook pours into the creek; on this stream, Paper Mill Run, an ancestor of Rittenhouse built the first paper mill in America, in 1690.

The whole Wissahickon region teems with legends of romance and history. Prior to the Battle of Germantown, British troops had a line on the hills which overlooked the creek. Legend declares that on a rocky eminence, called Indian Rock, Tedyuscung, an Indian chieftain, stood to take a last look at the land of the Delawares before leaving the neighborhood forever. While some versions credit this dramatic farewell to Isaac Still, known as the Christian Indian, who, in 1775, led the remnants of his tribe from Philadelphia to the banks of the Wabash, the bronze statue of an Indian erected on the promontory bears the name of Tedyuscung.

Long before it was incorporated in Philadelphia's park, this beautiful region had become famous. Fanny Kemble, who frequently rode on horseback along the narrow path bordering the Wissahickon, first called the attention of the world to its beauty in her "Journal." Poe, while he did not master the correct spelling of the stream's Indian name, spoke with enthusiasm of the magnificence of its forest trees. He advised that it be seen "in the brightest glare of a noon-day sun," warning that the narrowness of the gorge and the density of the foliage needed the relief of bright light.

Before the days of motor cars, Fairmount Park was the principal goal of Philadelphians who sought the great outdoors. Proud of its grassy lawns, its tree-lined walks, its cold springs and its romantic ravines, they yet found that it was too remote for most city dwellers. Various projects were suggested to remedy this condition. Finally in 1907 work was begun on a wide boulevard, called the Parkway, through more than a dozen solidly built city blocks. To permit the building of this broad avenue from City Hall to the original Fairmount hill, a distance of a little over a mile, more than one thousand dwellings and other buildings were razed. The work was continued over a period of twenty years and ten more required to complete the improvement.

Competent observers have described this as the greatest municipal work of its kind ever undertaken in the United States. Its only equal or the nearest approach to it was the Boulevard Haussman, in Paris, undertaken under Napoleon III. The Benjamin Franklin Parkway, as it is officially named, is distinctly an ornamental avenue. No commercial buildings are permitted and it is in that respect distinguished from the Parisian Boulevards. A gigantic undertaking, planned with boldness and vision, it becomes more lovely every year.

Starting from Reyburn Plaza at the north side of City Hall, the tree-lined Parkway extends diagonally in a straight line to the impressive Art Museum upon the original "Fairmount," whose Greek architecture and elevated position reminds the observer of the temples on the Athenian Acropolis. The building itself, however, is larger and higher than any of those ancient temples, occupying the whole top of Fairmount hill.

The constant aim in planning the Parkway was that it should be flanked by imposing public buildings. To ensure harmonious architecture of such structures, the Municipal Art Jury was given jurisdiction over the artistic character of all such projects. While no attempt has been made to have buildings conform to a general pattern (as was done in Paris), it is insisted that the architecture shall be good, appealing to the eye, and in harmony with its neighbors. As a result, the buildings which now front this great avenue are attractive and picturesque. Of the important buildings which were left abutting on the Parkway when it was cut through, that of the Academy of Natural Sciences and Natural History Museum was given a completely new facing of brick and stone and somewhat changed in architectural design. Curiously enough, the Cathedral of St. Peter and St. Paul, although built nearly ninety years ago, strikes a harmonious note with the general character of the avenue and of the newer buildings. It fronts on Logan Square (now a circle) approximately midway between City Hall and the Art Museum and is constructed of brownstone in Roman Corinthian style with a majestic dome.

In the immediate vicinity of Logan Circle in addition to the Academy of Natural Sciences and the Cathedral, are two very modern buildings—The Free Library and the new Municipal Court House. These give a distinctly Parisian aspect to this section of the Parkway and are in fact close, though not servile copies of the Ministere de la Marine and the Hotel de Crillon by Gabriel which front on the Place de la Concorde in the French capital. The latter of these is not yet quite completed, while the new United States Court House in Philadelphia has only recently been occupied.

Just west of The Free Library, two tall white marble pylons with sculptured groups near their bases commemorate the sailors and soldiers of the Civil War. These form a fitting gateway to that part of the Parkway which leads to the Art Museum. In the West Park, a more pretentious and greater monument to those who served in the war between the States is likewise a gateway forming an ornamental entrance to the Centennial Concourse; this is distinctly of an earlier mode.

At Twentieth Street and the Parkway stands the great Franklin Memorial, the home of Franklin Institute. In its magnitude and its architecture it is expressive of the present day and a real addition to the important structures which face this fine avenue back of its rows of trees. Logan Circle at this midway point is in the summer season a beauty spot which charms the eye with the colors of its myriad flowers blooming around an enormous fountain with gigantic recumbent figures. Between this and the Art Museum, the Rodin Museum stands at Twenty-first Street. It is a virtual reproduction of the French sculptor's Museé at Meudon and its unfamiliar architecture lends an attractive note of novelty. Standing majestically in front of the giant stone stairway which leads to the Art Museum is the Washington monument, erected by the Pennsylvania Society of the Cincinnati. It is a dignified bronze executed by the same Siemering who modeled the statue of Frederick the Great in Berlin, and resembles that piece in design, while surpassing it in magnitude and in the decorative arrangement of the ethnological groups at its base. It is said to be the largest bronze monument in the United States, though perhaps so only by a technicality since the much greater Statue of Liberty is not of cast bronze.

Philadelphia Entertainment

Longwood Gardens and Montgomery Ballet
Monday Evening, September 9, 1940

LONGWOOD GARDENS, nationally famous for its arboretum, flowers and electric colored fountains, will be the scene of unusual entertainment features offered to the members of the American Bar

Association who attend the Philadelphia meeting. Mr. and Mrs. Pierre S. duPont, of Wilmington, Delaware, who occupy Longwood Gardens, near Kennett Square, Pennsylvania, as their country estate, have graciously accorded this year's host to the Convention, the Philadelphia Bar Association, permission to extend to those attending the Convention an invitation to see the Gardens' wonders at first hand.

The Gardens contain an extraordinary display of trees and plants in their natural surroundings and are subdivided into formal gardens, planted in pleasing symmetry; a water garden, designed from the plan of the Villa Gamberaia near Florence, Italy; rose gardens, reminiscent of the Versailles Garden in France; and open-air theatre with a landscaped backdrop that makes it one jewel among many; and a boxwood garden, a full city square in size, directly in front of the conservatory containing boxwoods of rare size and dignity. An opportunity will likewise be afforded the guests to inspect the many rare floral varieties, particularly the orchids housed in the two and two-thirds acre conservatory.

Guests will arrive at the Gardens sufficiently early in the evening to enable them to roam through the areas which it is believed will be of particular interest. Maps will be furnished, so that none of the points of interest, which will long remain a pleasant memory, will be overlooked.

At dusk the Montgomery Ballet will give a performance in the out-door theatre. Mary Binney Montgomery, Director of the Ballet, is a native Philadelphian and also choreographer and designer of the costumes for the Ballet. Her company is composed entirely of American born and American trained dancers. She has appeared with her Ballet at Robin Hood Dell, Philadelphia, with musicians of the Philadelphia Orchestra for seven seasons and has also appeared with the Philadelphia Orchestra under the direction of Leopold Stokowski and of Eugene Ormandy. She is ballet mistress and choreographer for the Philadelphia Opera Company and has done all their ballets for the past year. At the conclusion of the Ballet, there will be a short display of the fountains which are concealed in the floor of the stage of the out-door theatre. This is a most delicate and colorful exhibition.

Following the performance at the out-door theatre, guests will assemble in front of the conservatory overlooking the boxwood gardens for a further display of the larger electric fountains, some of whose jets attain a height of sixty feet. By playing colored lights of many hues and densities upon the fountains, the grandeur of the scene is greatly enhanced.

Philadelphia Orchestra Concert

Wednesday Evening, September 11, 1940

The Philadelphia Orchestra, one of the great symphonic organizations in America, was founded at the turn of the century by a group of music loving citizens in Philadelphia. Under the direction of its first two Conductors, Fritz Scheel and Carl Pohlig, it became well known throughout the country.

In 1912 Leopold Stokowski became its Conductor. His first concert was a great success, and thereafter the Philadelphia Orchestra climbed to a place of preeminence in the music of this country. It survived the World War, with special concerts for enlisted men, sponsorship of Liberty Loan Booths and other helpful work. However, its finances were not yet assured and in 1919, under the guidance of Edward W. Bok, an Endowment Fund of over a million dollars was raised by public subscription. From that date on and under the leadership of a Conductor who was reaching world-wide fame, the Philadelphia Orchestra has built and maintained a reputation second to none in the world.

In 1936 Leopold Stokowski resigned as Conductor, and in the fall of 1936 Eugene Ormandy was engaged and has conducted the Orchestra since that date, although Leopold Stokowski has returned frequently as Guest Conductor during the past three years.

Eugene Ormandy, who will conduct the Orchestra, has arranged an attractive program consisting of Beethoven's Overture to "Leonore," No. 3, Opus 72, and his Symphony No. 5, in C minor, Opus 67; Tschaikowsky's Overture-Fantasia, "Romeo and Juliet"; "The Legend of the Arkansas Traveler" by McDonald; and "Emperor Waltz" by Strauss.

The Overture to "Leonore," written by Beethoven in 1806, was a revision of an earlier Overture written in 1805. It was to have had its premiere that fall in Vienna but the Austrian Army, under General Mack, had just surrendered to Napoleon. It is full of daring harmonic subtleties, romantic song, suspense, and bustling activity. The composer manages to adhere to the sonata-form and also to his melodrama of political hatred and conjugal love.

Beethoven's Fifth Symphony was written over a period of several years while Beethoven was in his middle thirties. His artistic eminence had been widely recognized but, nevertheless, he was in financial difficulties. It was finished in 1807 and performed first in Vienna in 1808, and is now recognized as the composer's greatest popular work.

Tschaikowsky's Overture-Fantasia, "Romeo and Juliet," first played in 1870 in Moscow, begins solemnly in the clarinets and bassoons with harmonies meant to suggest the medieval church. It next pictures the hatred between the rival houses of the Montagues and Capulets, and then proceeds with the romantic themes depicting the love of Romeo and Juliet.

The fourth item on the program is by a modern composer, Harl McDonald (at present Manager of the Philadelphia Orchestra). It stems from folk music, representing the culture of the countryside, the old fiddlers' tunes which for generations have enlivened holidays, barn-raisings, and cross-road hamlets.

The last item, Strauss' Emperor Waltz, will close the program upon a light but popular note.

This musical entertainment which the Philadelphia Bar Association is offering to lawyers from other cities should serve as a cultural diversion during the week's proceedings.

Luncheon at Valley Forge

Friday Afternoon, September 13, 1940

Through the courtesy of the Insurance Company of North America, members of the Association will have the privilege on Friday, September 13th, of visiting one of America's most famous patriotic shrines—Valley Forge.

In August, 1777, the British landed troops at the head of the Chesapeake Bay and commenced their march toward Philadelphia, which was the capital of the Colonies. Washington's resistance was broken by the superior forces of General Howe in the Battle of the Brandywine and at Germantown with the result that early in October the redcoats took possession of Philadelphia and settled down in winter quarters.

At that time the Continental Congress fled to York,

Pennsylvania, and, with the idea of protecting York from a sudden British incursion and at the same time keeping his eye on Howe and his army in Philadelphia, Washington selected the commanding position of the hills at Valley Forge for his winter camp. Accordingly about December 19, 1777, Washington and his army of about 11,000 men, nearly 3,000 of whom were then handicapped by illness and lack of clothing and equipment, started the construction of their winter camp.

Washington established his headquarters in the home of Isaac Potts, who was the proprietor of a grist mill along the Valley Creek. Mr. Potts and his family obligingly vacated their home for the use of Washington. Within the simple stone walls of that house there met with the Commander during that famous winter those giants of the Revolution whose names still make every American heart thrill: Lafayette, Knox, Morgan, Anthony Wayne, Nathanael Greene, Alexander Hamilton, von Steuben, deKalb, Muhlenberg, and others. When spring came the great Baron von Steuben drilled the tattered Continentals and increased their fitness for services in the campaigns which were to follow.

Just six months after going into camp Washington learned that the British had evacuated Philadelphia and on June 18, 1778, moved the main body of his troops from Valley Forge to flank the British and to harry them as they retired across New Jersey.

It was not until 1878 that a body of patriotic men and women incorporated the Centennial and Memorial Association of Valley Forge, and acquired and put in order Washington's Headquarters and the land immediately surrounding the same. In 1893, the General Assembly of Pennsylvania created Valley Forge Park, which now embraces about 1,500 acres, comprehending the major part of the area once occupied by the troops of Washington's Army. The Valley Forge Park Commission has held and administered this Park faithfully and well. Its dogwood constitutes in May a display of forest beauty that is unequaled, but the rolling hills of Valley Forge are beautiful as well in September, and it is anticipated that a great number of the visitors will take advantage of the opportunity to visit this shrine of American liberty and patriotism.

Shortly after the conclusion of the meeting on Friday morning, September 13th, the party will leave by Pennsylvania Railroad for Devon, where they will be met by buses and driven to the Park, where a buffet luncheon will be served, followed by a tour of the principal points of interest. The return to Philadelphia will be made by bus, through the celebrated "Main Line" residential suburbs of Philadelphia.

The Ladies!

THE program of social activities and entertainment for the women runs the whole gamut of the couplet:

Something old,
Something new,
though there is
Nothing borrowed, nor
Nothing blue. (Unless it will be the women's clothes.)

The charming old colonial houses in the older city, in the Park and in Germantown will be visited, with luncheon at the Philadelphia and the Manheim Cricket Clubs. Among the rare old houses to be visited will be the Powell House, Mount Pleasant, Strawberry Mansion, and in Germantown "Stenton," "Wyck," Cliveden, (the Chew Mansion) the scene of the American Revoluton's Battle of Germantown, and the Newhalls.

New fashions and styles will be shown at the world famous Wanamaker and Strawbridge and Clothier stores, which will hold Fashion Shows and Teas in honor of the visiting women.

Philadelphia is noted for its beautiful suburbs, not excelled anywhere for their delicate and sensitive beauty, variety and color. Chestnut Hill and Germantown, a typical English countryside, will be visited and some of the beautiful homes and gardens opened to our visitors. Among these may be mentioned "Laverock" the beautiful estate of Mrs. Arthur Newbold; "Kresheim," overlooking the beautiful Wissahickon, the home of Dr. and Mrs. George P. Woodward, and the interesting Tudor place of Mrs. Samuel P. Rotan, which dates back to the 15th century, and was brought to this country from England. The guests will be taken for tea to the Morris Arboretum which has the finest collection of plant and tree life in the world with only one exception Kew Gardens, out from London. The Upper Wissahickon, never open to traffic, will also be opened, through the courtesy of the "Friends of the Wissahickon," to our American Bar Association guests. The Upper Wissahickon knows not the sound of the automobile horn, but only of the galloping horse, the tallyho and other charms of a by-gone age.

The famous Main Line with its elegant and exquisite homes and gardens will also be visited, and some of the loveliest gardens will be opened to our visitors with tea at one of the Cricket Clubs.

There will also be opportunity to visit the Planetarium, Franklin Institute and the Art Museum (pure Greek in architecture, and containing the famous Johnson collection). Broadcasting studios will be opened to our visitors, and Wanamakers are arranging a special program including talks on furniture, art, music, etc. The city's clubs and country clubs will be available for golf, swimming and other sports. As there will also be a nursery, do not hesitate to bring your children.

Since you cannot go to Rome to enjoy the Old, the Medieval and the New, come to Philadelphia and enjoy all three under the generous hospitality of the City of Brotherly Love, the City with a Soul.

State Bans Aliens from Jobs

Every state in the Union except Missouri has laws barring aliens from certain occupations, or otherwise differentiating between the rights of aliens and American citizens. Both North Carolina and Pennsylvania have passed alien registration laws. The North Carolina provision remains on the book although it is largely inoperative since, unlike the Pennsylvania law, it requires no registration fee and imposes no penalty for failure to comply. The Pennsylvania statute, however, was held unconstitutional by a U. S. District Court as a usurpation of "a power confided by the Constitution to the Federal Government."

Occupations from which aliens are most generally excluded are the professions. Only six states permit aliens to become lawyers or certified public accountants. Thirty-eight states will license them as pharmacists, while only twenty-seven permit aliens to practice medicine. All but five states allow them to enter the profession of optometry. . . .

[*State Government—June,* 1940]

LAWYERS CAN HELP MEET GREAT ISSUES*

By Hon. William L. Ransom
Of the New York Bar

IF lawyers are as wise in their own affairs as they are for their clients, they will now take stock of what their Bar Associations are doing and will try to plan what they can best do and best leave out, for the years immediately ahead. I am honored and happy to be asked to attend again an annual dinner of the Kansas City Bar Association, although you meet under circumstances which are of anxious import. During my years of work for the American Bar Association, I was fortunate in forming strong friendships in this City and State. As years rush by and we come closer to "life's varying shore," such friendships mean more and more; and opportunities to renew them are most welcome. We of the American Bar Association are forever grateful to the lawyers of this City and State for the gracious hospitality which has been so generously extended to our meetings and our work, including our great Annual Meeting here in 1937. My return here today is slight token of that debt. Most of all, this is a time for the exchange of views and the taking of counsel, among lawyers and citizens in all parts of our country. None of us can afford to hear and heed only what is being said in his own locality.

When your invitation was sent to me, you no doubt thought, as did I, that I would discuss some of the matters which in ordinary times make up the pattern of our Bar Association programs. After the manner of voluntary and democratic institutions, we have been content to move or muddle along in a rather lackadaisical way, doing work for the most part useful but rarely conspicuous, grappling with great issues sometimes, but falling far short of what the organized lawyers could do and be in a troubled land.

There are many things I would like to talk about, that concern our own interests as lawyers—the ever-shrinking volume of law business for private clients, in most communities, the prevalent atrophy of private enterprise by which alone can lawyers live and stand on their own feet, the steady inroads of the idea that men should look to government for directing and underwriting their business and their security and should depend little on their own efforts and their own decisions made after independent advice, the absorption and doing of law business by governmental boards and bureaus and employees, the serious plight of many young and ambitious and honorable members of the profession, and many of its capable seniors as well, who find their means of livelihood menaced and have not yet rallied to recapture or replace it. These are serious matters which have worried many of us deeply; we ought to be doing all in our power to restore an independent and self-supporting Bar—lawyers who find useful and creative and constructive work in the legal problems which arise from active and venturesome business in their own communities under an American system of private enterprise which is policed but not intimidated or slackened by government.

Many Bar Associations have lately made a good start toward finding the facts and doing something to relieve the plight of many members of our profession. But even if you wanted it, I doubt if I could give you tonight the kind of counsel which not long ago was conventional in such a gathering of lawyers. A young Scotchman learning to play the violin struggled hard and did his best, before a company of friendly and patient listeners. When the discord of sounds died down, a kindly soul said, "Sandy, play Annie Laurie." Sandy looked perplexed and unhappy. "What," he said, "again?" Tonight there could be no encore, no "again," for the discussion merely of Bar Association organization and procedures.

New Issues Are in First Place

We have lately seen the legal profession destroyed outright and the rule of law and justice ended, in lands where not long ago free and happy people sang hymns of liberty. We have read of the destruction of unoffending little nations whose way of life had realized what semed to many of us an almost ideal "middle way" of contentment and self-government. Just now we behold the oldest of the free nations brought also to the brink of annihilation through force and hate. In England, from which came the bases of our laws and our historic liberties, we have seen the Parliament which speaks for a free people surrender voluntarily all individual liberty and all rights of property,[1] in the hope that thereby they can collectively be saved from what the gentle King called yesterday "the destruction of the world as we know it and the descent of darkness upon its ruins." The supreme body which wrested English liberties from reluctant kings has placed all power in the hands of such of its members as are Ministers of the King, to the end that England shall not be overrun by "the more hideous Huns and fiercer Vandals of whom Macaulay prophesied." Our brethren across the sea are giving all, risking all, holding nothing back, in their resolve to defend and keep a world in which Magna Carta and the Bill of Rights will have eternal meaning.

*Address delivered at the Annual Banquet of the Kansas City Bar Association, May 25, 1940.

1. The Act passed by Parliament and given royal assent on May 22nd provides, in part:

"Whereas by the Emergency Powers Defense Act of 1939 His Majesty was enabled to exercise certain powers for the purpose of meeting the emergency existing at the date of passing the Act, and;

"Whereas by reason of the development of hostilities since that date it has become necessary to extend the said powers in order to secure that the whole resources of the community may be rendered immediately available when required for purposes connected with the defense of the realm;

"Now therefore be it enacted by the King with the advice and consent of the Lords and Commons and by their authority as follows:

"Section 1 (1) Powers conferred upon the King by the 1939 Emergency Powers Defense Act (hereinafter called the principal Act) shall notwithstanding anything in that Act include power by Order in Council to make such defense regulations, making the provision requiring persons to place themselves, their services and their property at the disposal of His Majesty as may appear to him necessary and expedient for securing the public safety, defense of the realm, maintenance of public order or efficient prosecution of any war wherein His Majesty may be engaged, or for maintaining supplies essential to the life of the community. . . .

I have no thought of trying to talk to you about the repercussions which these tragic events are having and will have in our own economic life, our political alignments and issues, and our democratic procedures in government. Speaking only for myself, I do not believe that all rational and humane values, all chance of saving free government in America and the world, will be destroyed by the outcome of the battle on the field of Flanders. The ceaseless struggle of men and women for freedom and opportunity and justice, for themselves and their children, could not be forever snuffed out in a world which has known liberty and the contentment of quiet ways of life.

But such a crisis in many lands clearly calls on all of us to take stock quickly of our own situation and to form our own ideas as to the direction in which we want our country to go. Specifically, to us as lawyers, there comes a challenge to do our part in helping to inform and lead public opinion as to some very fundamental issues. Nothing else we have been doing is as important now. Several of these questions I shall try to indicate to you, but I bring you no answers to them. I have no such pride of opinion; no one man could give the answers. An immediate task of our organized profession as a whole is to try to develop and suggest the sound answers.

We as lawyers have come to know the distinctive aspects of the American background—a written Constitution, a three-way division of powers, fixed terms of office, no legislative supremacy, no constant parliamentary accountability of Ministers to the people, an accentuation of the voice of government through the radio under administrative control, an increasing difficulty for any independent spokesman to be widely heard in competition with those in power. At a time when the channels of courageous public discussion should be kept open at all hazards, it may be that the organized lawyers can be heard where even the boldest individuals fare badly in competition with the voice of government. A part of the background is also a numbness, amounting at times to defeatism, as to the pace and extent of the changes which have been taking place in the laws, the rulings of Courts, the participation of government in business decisions, the support given by government to those who agitate openly for class warfare and industrial discord. The kaleidoscope of change has been shifted too fast for public comprehension. In a Boston department store, "efficiency experts" had been at work and were moving and re-locating departments no end. Everything seemed to be changed around. A customer out of breath came up to a worried, harried floor-walker; she asked "Where is the kitchen hardware department?" He replied: "I can't tell you where it is, but if you'll stand right here a few minutes, I'm sure you'll see it go by." Too many citizens have come to some such a confused state of mind about their government; they accept invitations to stand still and see the changes go by. Shrugging the shoulders and lifting the eyebrows have become too much the American technique of "resistance," as in other lands now over-run.

The Saving of Civil Liberties

First of all, among the matters on which lawyers should help, I state the problem of maintaining civil liberties, at a time when gales of prejudice, alarm and hysteria may sweep through the country or through parts of it. Freedom of speech, freedom of worship, freedom of the press and the radio from governmental control and mis-use, freedom of assembly and open public discussion to communicate information and opinion, freedom of persons from unjust accusation and seizure—these are fundamental American liberties, which ought not to be laid aside lightly or limited even temporarily for less than most compelling reasons. I do not mean merely the defense of persons whose rights of free speech or other assured liberties have been denied by local or other governments. The American Bar Association took the lead, two years ago, in setting up the machinery for vigilance against such invasions of freedom; the Department of Justice and other organizations have now joined in keeping watch. As to freedom of worship, the Supreme Court has lately taken the position that it is better to tolerate annoying and misguided exercise of that freedom than to make precedents for suppression.[2] In so doing, the Court was careful to point out that the Fourteenth Amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[3] As to freedom of speech in the field of labor relations, the Supreme Court has held, at least as to the rights of employees, that open discussion and the dissemination of both information and opinion as to an industrial controversy may not within constitutional limits be denied or abridged by State or local regulations, absent clear and imminent danger of the destruction of life and property, invasion of privacy, or violent breach of the peace.[4] When the question is presented, this vigilant resistance to local curbs on open discussion of employees' contentions as to employers may be extended logically to employers and to the disturbing view held by the Federal agency that free speech is no more than "a limited right." There seems to be reason for great confidence that, come what may in the form of judicial decisions where issues of legislative policy are offered for adjudication, the great Court will enforce resolutely against all agencies of government the substance and the verities of the historic freedoms, where government places individuals in jeopardy for the honest exercise of rights vouchsafed by constitutional guarantees.[5]

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2. *Cantwell* v. *State of Connecticut*, decided May 20, 1940.

3. Of far-reaching significance are the following observations by Mr. Justice Roberts, in the *Cantwell* case, for a unanimous Court:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in Church or State, and even to false statement. But the people of this Nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

"The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish."

4. *Thornhill* v. *State of Alabama*, decided April 20, 1940.

5. The broad grounds on which the Court based its ruling are shown in significant excerpts from the opinion by Mr. Justice Murphy:

"The freedom of speech and of the press guaranteed by the

Dangers Through Intolerant Official and Public Opinion

But this by no means encompasses the whole present problem of maintaining the substance of civil liberties:

1. Intolerance and proscription by public opinion, especially when engineered by government through the radio and press, may be as pervasive and effectual in denying and discouraging free speech as any local ordinances or administrative rulings could be. A few days ago, a gallant and well-informed young American, who had seen and foreseen at first hand the mechanized forces which now are devastating vast areas, ventured to express publicly his views as to what his country should soundly do in the great emergency. Instantly a deluge of denunciation came from high places; cavil against his motives, his judgment, and even his loyalty to his country, was blared into countless homes, by public officers and their sycophants, who had learned the technique of totalitarian propaganda but had themselves practically no information and no capacity for trustworthy opinion as to most of the matters he had discussed. Colonel Lindbergh may have been wrong or he may have been right; I by no means agree with him fully; but an alarming thing is the use of authority and high place to discredit and proscribe one who otherwise might be an independent, respected and competing voice in the guidance of patriotic public opinion. At almost any hazard, the channels of informed and disinterested public discussion, even criticism, should be kept open, by an enlightened public opinion. Judicial reversal of ill-advised convictions for exercising rights of free speech is not enough; the watchfulness of lawyers against inadequate defense of persons so accused is not enough.

Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this Nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. . . .

"In the circumstances of our times the dissemination of information concerning the facts of a labor union dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147, 155, 162-63. See *Senn* v. *Tile Layers Union*, 301 U. S. 468, 478. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. . . .

"The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

"The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

New Formulations Needed for Public Protection Against Abuse of Free Speech

2. In the United States we have not yet worked out the formulas for preserving the historic freedoms of the individual and at the same time preventing these civil liberties from being used as cloak and cover for ruthless sabotage of all free institutions, by those who, in the schools and colleges, the press and labor organizations, and even in high places in government, are insistently doing all they can to undermine all faith in our institutions and to instill an acceptance of totalitarian improvisation. In this hour of travail, we have yet to appraise the disruptive and weakening effects of all that was so insidiously and insistently preached, to break public confidence in the leaders of business, the influence of the Church and the professions, the integrity of public officials, the effectiveness of moderate leadership of labor organizations, the sense of patriotic pride in our country's history and the devotion of its great leaders. Those who have lent themselves to alien causes in the stirring up of class and racial warfares have probably done more actual damage than have those who sold themselves to alien agents for the same purposes.

Other free peoples have had to try to find the formula for a safe balance between freedom and self-protection against the first and most insidious of the alien invasions. Norway failed; Belgium, Holland and Denmark failed; the issue is hid behind censorship in Sweden, England, Ireland, and France; Switzerland, the most democratic of governments, apparently succeeded, in time.[6] The United States needs to study and to profit by the tragic experience of other lands. How to save civil liberties and still end preachments and plannings which in a critical time may be tantamount to treason—here is a task worthy of the genius and best thought of American lawyers.

Freedom from Accusation for Undefined Offenses

3. The status of civil liberties in the United States seems to me to have still another unanswered problem of vast import—the dangers inherent in vague, generalized, indefinite laws which prohibit this or command that, and leave to politically-constituted administrative boards or officers the power to say what constitutes a

6. Switzerland passed and enforced a law which declared the Communist party to be illegal, banned its publications, and deported aliens who had been identified with it. Later, for the defense of its institutions, the Swiss Republic made it a crime to hold up its institutions to ridicule or contempt, or to conduct an agitation against any race, religion or national origin.

violation and what citizens are guilty of violation. The vague phrases of these multiplying laws leave it to these boards to create vast new offenses, virtual crimes, by saying so, and to decide who shall be accused and prosecuted for violations. The selection of those who shall be pilloried and proscribed as guilty is left in administrative or political discretion. The selection is open to be influenced by considerations of class warfare or political reprisal against employers, bankers, physicians, particular labor organizations—whoever opposes the administrative will. Every lawyer here will fill in his own specifications from his own experience, as to the kind of laws I mean—such phrases as "interference," "restraint of trade," "domination," "control," "contrary to the public interest," etc.

I submit for your consideration whether civil liberties are safe under a system in which the average citizen and his lawyer cannot tell in advance with some sense of certainty what constitutes a violation of the laws in force, and in which the decision as to prosecution is left to the same board which says what the law means, and what constitutes guilt of violation, with the Courts virtually ousted from power to review arbitrary action and prevent injustice.

Here is one of the greatest dangers to the substance of liberty, in the present crisis—the indefiniteness of many laws, the unreviewable discretion of the boards which say what constitutes a violation and who is guilty, and the failure to draft and enact amendments would make these laws more definite and certain. Yet already the National emergency has been seized on—by those who want to keep arbitrary powers over business, labor, and industrial production—as justifying the abandonment or defeat of even moderately corrective measures.

"The Mere Sorting Out of Facts to Suit a Preconception of Policy"

In the second place, I submit to you the mounting problem whether the substance and reality of justice according to law can long exist, if the supposedly judicial determination of the rights of persons and property is much longer left subject to "the mere sorting out of facts to suit a preconception of policy," with review by law-governed Courts excluded. Some of you may have been present in Washington last week when the beloved Chief Justice of the Supreme Court spoke at the meeting of the American Law Institute. I wish that several paragraphs of his stirring address could be emblazoned in every legislative hall, the hearing-room and meeting-room of every administrative board, the meeting-place of every Bar Association. Chief Justice Hughes first declared that

> "If democratic institutions are to survive, it will not be simply by maintaining majority rule and by swift adaptation to the needs of the moment, but by the dominance of a sense of justice which will not long survive if judicial processes do not conserve it.
>
> "The judge must in truth represent authority, but he is not the symbol so much of power as of justice, of patience and fairness, of the weighing of evidence in the scales with which prejudice has not tampered, of reasoned conclusions satisfying a sensitive conscience, of firmness in resisting both solicitation and clamor. It is in the quality of judicial work—whether performed by Courts or by agencies invested with judicial functions—in its expertness, thoroughness, independence and impartiality, that the whole scheme of law, of government by law, comes to the decisive test."

And then the great Chief Justice used a phrase which goes to the heart of the greatest issue affecting the rights of persons and the administration of justice under law. He said:

> "We cannot afford to lose the ideal of a fair and adequate hearing in a passion for expedition, or *to make the processes of the law a mere vehicle for prejudgment or for a mere sorting out of facts to suit a preconception of policy.*"

"The processes of the law a mere vehicle for prejudgment?" "A mere sorting out of facts to suit a preconception of policy?" Every lawyer with experience as to some administrative agencies knows to his sorrow what these phrases mean. No matter what the actualities and the evidence—no matter how clearly and strongly the preponderance of the credible and reputable evidence shows the actualities—too many of these administrative boards and agencies sort out and marshal, with elaborate innuendoes, only such of the evidence as suits and supports the preconception of policy. Findings are based on this evidence selected for a preconceived result. The reviewing Courts find there is evidence supporting the findings, and the Courts are then stripped of power to do justice and enforce even "the rudiments of fair play." The only remedy is legislative and political, as the Congress yielded to executive importunities for laws which enable boards to be appointed for the purpose of sorting out such evidence as would suit a preconception of policy—laws which withhold from the Courts the power to correct and prevent such grave abuses of justice and flagrant digressions from impartiality.

Analogies to Jury Trials Are Not Apt

Your own Judge Otis, in the latest phase of the *Morgan* case,[7] recently pointed out the dilemma in which judges and Courts with a desire to do justice are placed by these recent statutes, some of them antedating 1933. As he stated the matter far better than I could, I quote him:

> "The overwhelming weight of evidence—the testimony of twenty witnesses—may support one finding, a maximum of substantial evidence. The testimony of a single witness may support the opposite finding. If the administrative agency, actuated by pique or prejudice or class interest or a consideration of the number of votes to be gained by 'the party' finds against the weight of evidence, the reviewing court is helpless.
>
> "And if, under compulsion of law, the reviewing court affirms the agency, it is proclaimed in the world that the United States District Court or the Circuit Court of Appeals or the Supreme Court of the United States has indorsed and approved what the agency has done, it is not unnatural that judges should look with disfavor on such a consequence.
>
> "How superficial it is to compare such an arbitrary, possibly even dictatorial, fact-finding power with the fact-finding power of a jury. The jury is constantly under the supervising control of the judge. The judge excludes evidence that is irrelevant, immaterial or otherwise incompetent. He reviews and sums up the case. He inspires the jury at the hour of its final functioning with the high ideals of justice and truth. And he may set aside whatever verdict the jury has returned.
>
> "I think my colleagues have not been able to accept the new philosophy seen in another aspect. To them the 'full hearing' which the law requires an administrative agency to give the parties means a hearing comparable in all important details to the historic judicial hearing, a hearing in the solemn and dignified atmosphere of a court room, where the testimony received under the time-tried rules of evidence, is presented

7. *Morgan* v. *United States* (U. S. Dist. Ct. Western Dist. Mo.; three-judge Court), decided April 9, 1940 (dissenting Opinion by OTIS, D. J.).

orally to a trained judge, to an impartial judge, (the parties may have him removed for bias and prejudice if he is deemed not impartial), to a judge who hears the arguments of opposing counsel and thereafter decides the issue.

"It is a far cry, my colleagues think (and so think I) from that kind of hearing to such a hearing as that contemplated by, for example, the packers and stockyards act, where the testimony is taken by an examiner (who may also be in fact active counsel for one of the contending parties) where the deciding power is vested in an official who never sees a witness, where the ultimate authority cannot practically even read the evidence (although he may be compelled to say that he has done so), where there is no satisfactory way under heaven to dislodge a biased and prejudiced agency and secure another, and where the decision of the agency, so functioning, as to every issue of fact, if supported by any evidence (however defiant of the weight of the evidence), is made as conclusive as the command of a despot. My colleagues find it difficult to see 'due process of law' in such a medley of ritual and form and shadow. I honor and respect them for their steadfastness."

Here again is an issue worthy of all of the time and thought which American lawyers can give to it. Here is a front battle line between freedom and arbitrary power. What is the formula of solution? The American Bar Association has made a bold and competent beginning in its Walter-Logan Bill, which passed the House of Representatives but still lacks the necessary votes in the Senate. The bill is far from perfect; it hardly goes to the whole problem. Lawyers should study it and help perfect it and fight for it; criticism of it has come chiefly from those who seek to keep arbitrary power uncurbed. We ought to work with those who sincerely want to save the good which is inherent in these modern agencies and at the same time compel them to conform to justice and fair play. In that category I still place the present Attorney-General of the United States, a valued member of the House of Delegates of the American Bar Association.

Labor Laws and Industrial Production

In the third place, I submit to you the unanswered challenge of the problem as to how in America we shall be able to hold the substance of our humanitarian gains in labor legislation—as to hours, rates of pay, security for old age, standards of living—and at the same time have an industrial economy which will function efficiently and adequately in tasks of preparedness. The nations now most effective in war began by destroying all labor organizations. Even in the free countries, the status won by labor through long years of effort seems to have been thrown overboard completely and suddenly after tragic experience with short work days and work weeks brought them to the edge of calamity. "Saving their social gains" may not now seem to have been so important, in France, England, Norway, Belgium, Holland.

We of America are naturally reluctant to turn back the clock, to abandon the advanced ground that has been gained by many years of patient and effective collective bargaining supplemented lately by laws which may be now too rigid and inflexible and which may even have destroyed that friendly cooperation between employers and employees which would be the best assurance of maximum production. Voices are now heard which demand that all these laws be scrapped; voices are heard which demand no retreat and demand even further restrictions on the power of American industries to serve and save this country. Is there any formula of adjustment and solution? Can we find and offer any feasible middle ground? I only state this paramount problem; I would like to talk about it, as I see daily a good many of its implications; time permits me only to point out that lawyers should not be indifferent to problems of the labor laws and should help in solving this dilemma if they can.

Struggle to Save Democratic Way of Life

We cannot hope to escape the impact and the dislocations from what is taking place abroad and at home. The liberties and the opportunities which we of America enjoy were won and held on fields of battle, in lands across the sea and on our own soil. Kipling put it this way—

"All we have of freedom, all we use and know—
This our fathers bought for us, long, long ago;
Steel and torch and tumult lance and grey-goose wing,
Wrenched it, inch and ell and all, slowly from the King."

Today's picture in the world is different. Governments set up by the people themselves—governments which once had constitutions, laws, courts, great judges, great lawyers—these governments seize arbitrary power and become the antagonist. We hold here to the democratic process, and can keep it functioning if we will. Today's and tomorrow's struggles to keep alive on this continent our heritage of liberty and justice under law are not likely to take place on fields of battle. The real tests will come in legislative halls and executive offices, sometimes in the Courts, always in the great forums of public opinion and political action, where our citizenship will either be lulled and lured by cries of supreme need and by offers of a false security, or will be aroused and kept vigilant by the leadership of men and women who dare to speak bravely and risk everything for their faith in impartial, law-governed justice and fair play.

Lawyers Will Help Give the Answers

In every place where the issue is joined and efforts are made to keep men free from arbitrary power in governmental or private hands, there will be lawyers —all sorts and conditions of lawyers in all sorts of capacities, lawyers with all manner of backgrounds and beliefs, lawyers who will remember or will forget that they have made their way under the American traditions, lawyers who will own or will overlook that they are the offspring of our system of free enterprise, lawyers who in the long run will either save the institutions of their country or go along meekly with a remaking of them according to alien standards. If the rational and humane values which go with the American ideal of personal freedom are to be cherished and kept a part of our way of life, lawyers will help give that answer.

This is a great and stirring time to be an American lawyer. "There are high adventures for this hour," and for the days and years ahead. American lawyers can give such answer as they will, for the future of their country and of their profession as well, for the two are inseparably linked. Wherever we are, whatever we are doing, whatever political party or creed claims our allegiance, we ought to stop fooling, face the realities, stop the weak compromises and the soft acquiescence, and pay no heed to the sophistries of surrender which have led other free peoples to destruction. American lawyers everywhere ought to get down to brass tacks and help our legislators keep American liberties safe, come what may.

Non-Essentials Should Be Laid Aside

From my earliest days of practice in New York, I recall an inelegant expression, used by a great Fed-

eral judge, which may give point to what I mean. I had come down from the country, and had gained some experience in practice in the State Courts. Procedure there was then a bit formidable, in cases tried without a jury, and included the preparation and filing of very detailed findings of fact. Oftentimes cases were won or lost on appeal by reason of the skill and detail of the requested findings and what the trial judge had done with them.

After I had won my first case in the Federal District Court, I drew and submitted very detailed findings to be embodied in the decision. It was a complicated case, and I was proud that my findings spared no detail and omitted nothing. The trial judge sent for me—he was of that era when judges were trained lawyers with a passion for justice rather than predilections about public policy. After chatting with me a few moments to put me at ease, he picked up the formidable document of which I had been so proud. In the most kindly fashion he then said,

"Young man, here in the Federal Courts we don't *fly-speck* all over a case the way you often do in the State Courts."

I adopt tonight the phrase. We lawyers, in our Bar Associations and in our public activities, should not "*fly-speck*" all over the whole field of matters which ordinarily would be interesting and useful to our profession. In such an hour, all our Bar Associations should consider to what extent they should now lay aside their expanding non-essentials—put away new "paper-work" programs, often spread far too thin—and concentrate on helping to meet the great issues which will decide whether the United States will long be a land in which independent and outspoken lawyers can protect, even against governmental discretion, the rights and liberties of citizens who are themselves free.

There seem to be great and compelling tasks ahead for American lawyers and their Bar Associations. I have sketched some of the challenging questions; I have not undertaken to give answers, which should come from the deliberative judgment of the profession. For such a task, there could be no more expert, representative and democratic organization in America. Local Bar Associations and their members are in every city, town and county, throughout the United States. State Bar Associations have members throughout every State. Each State Bar Association, and the larger local Bar Associations, are represented by delegates of their own choosing, in the great House of Delegates of the American Bar Association. The members of the American Bar Association, at home in their States, nominate by petition, and elect by mail ballot, a delegate from their State. Every important and influential organization of lawyers is democratically federated, in the House of Delegates. The experience and the expertness, the public spirit and the representative character, the friendly tolerance and breadth of view, the ability to develop reasoned conclusions which will have their roots in every community in the land—these resources and loyalties of the organized Bar are brought together in the House of Delegates; and back of its membership and their State and local organizations are an accurate comprehension of the public opinion in countless communities. If you will think it over and throw off the natural disinclination of lawyers to lead rather than merely advise when asked, I am sure you will conclude that there could be no better voice in aid of America.

Arrangements for Annual Meeting, Philadelphia, Pennsylvania, September 9-13, 1940

Headquarters—Bellevue-Stratford Hotel

Hotel accomodations, all with bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin beds for 2 persons	Parlor suites (2 rooms for 1 or 2 pers.)
Adelphia (13th & Chestnut)	$3.50–5.00	$5.00–6.00	$6.00– 8.00	$12.00–25.00
Barclay (18th & Rittenhouse Sq. E.)		6.00	7.00–10.00	12.00–18.00
Bellevue-Stratford (Broad & Walnut)	All space exhausted.			
Benjamin Franklin (9th & Chestnut)	3.50–5.00	5.00–6.00	6.00– 8.00	12.00–14.00
Drake (1512 Spruce St.)	3.50	5.50	6.00	10.00
Essex (13th & Filbert)	3.00–3.50	5.00–6.00	7.00	
McAlpin (111 So. 10th St.)	2.25–2.75	4.00	4.50– 5.00	
Majestic (Broad & Girard)	2.50–3.00	4.00–5.00	5.00	8.00–12.00
Manufacturers & Bankers Club (Broad & Walnut)	(Men only) 3.00		6.00	
Philadelphian (39th & Chestnut)	3.00–4.00	5.00–5.50	6.00– 8.00	9.00–20.00
Ritz-Carlton (Broad & Walnut)	All space exhausted			
St. James (13th & Walnut)	3.00		5.00– 6.00	10.00
Stephen Girard (2027 Chestnut St.)	2.75–3.25	4.50–5.50	5.50	
Sylvania (13th & Locust)	3.00–3.50		5.00– 6.00	10.00–12.00
Walton (Broad & Locust)	2.50–4.00	4.00–5.00	5.00– 6.00	8.00–12.00
Warburton (20th & Sansom)	3.00		5.00	
Warwick (17th & Locust)	4.50–5.50		7.00– 8.00	12.00–14.50
Wellington (19th & Walnut)	4.00		6.00	8.00

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, *first and second choice* of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

London Letter

THE writer of the following letter is a very distinguished London lawyer. He is at the same time the Editor of all the Law Reports of England and Wales. His letter is in reply to a private request [on behalf of the present Managing Editor] for a discussion on two specific topics:

1. The comparative goodness of legal research and brief-writing in England and America.
2. Some comments on the effectiveness of Legal Classification as it appears in modern English Law Books, as compared to Legal Classification in America.

His remarks should be of interest to American lawyers.

The Incorporated Council of Law Reporting for England and Wales.

13, Serjeants' Inn,
Temple, London, E.C.4.
19th February, 1940.

Dear Sir,

Your letter of January 3rd together with the copies of the American Bar Association JOURNAL containing your two articles* have been sent on to me by the Secretary of the Council of Law Reporting to whom they were addressed. As a practising lawyer, and, in particular as Editor of the Law Reports published by the Council, I have read them with great interest, and I look forward with pleasure to the appearance of those future articles in which you propose to examine the practical application of the principles and ideas you have discussed.

With regard, however, to the matters the particular subject of your letter I am afraid I can be of little assistance. "Briefs" in this country are not prepared for Courts in the sense that they are submitted by the parties to the Court, as appears to be the practice in the United States.

In England, as you are no doubt aware, the profession is divided into two separate branches called respectively "barristers" and "solicitors," and generally speaking a "Brief" may be described as a document embodying the instructions by the solicitor to the barrister to appear in the cause or matter the subject of the trial or enquiry, and containing the material and information necessary to enable him to conduct the case. It is not an official document and therefore there are no rules governing the form the "Brief" should take; its quality and value depend entirely upon the skill and competence of the solicitor who prepares it. It is not submitted to the court, and it concerns no one but the barrister and the solicitor instructing him. This short description of what we understand by the word "Brief" in this country, will, I imagine, serve to show that we do not mean the same thing by it as you do in the United States. If I am right in my assumption that by a "Brief" you mean a written statement of his case presented by a party to the Court before which his case comes to be heard or argued, I may say that the only document which appears in any way to resemble it is what is known here as the "case" prepared in those matters which reach the ultimate appellate tribunals of the House of Lords and Privy Council. This "case" consists of a concise detailed statement of the proceedings in the Court below together with the order made by that court, and the reasons or grounds of appeal. The party preparing it must state the facts as they were proved in the Court below and he may cite legal authority in support of his argument in such words as he may deem most expedient for the interests of his case. (This however is seldom done. All cases heard by the Judicial Committee of the Privy Council and the House of Lords are argued orally and there is no fixed limit to the time that counsel may take over the presentation of his case). The "case" is prepared by each side individually and must be signed by counsel. It is then handed to the Court office and is printed and attached to the record for presentation to the tribunal. These "cases" however, are not available for general inspection and I am not able therefore to supply you with any data—or means of obtaining such data—as would enable you to draw conclusions as to the relative merits of the American "Brief" and the "case" presented to the House of Lords or Privy Council, even assuming that these documents bear any resemblance to each other or are prepared for the same purpose. I am therefore unable to give specific answers to the two questions asked in your letter.

Turning to the matters discussed in your articles in the Bar Association JOURNAL and with particular reference to your proposed solution of the difficulties arising from the vast and increasing number of reported decisions, I may say that the practice of publishing Digests is one of long standing in this country. The Annual and Decennial Digest published by the Council of Law Reporting, Mew's Digest published by Sweet and Maxwell are in common use among practising lawyers, and they are both similar in form. Every reported case is included with a statement or headnote and all the cases are classified in much the same way as is indicated in the diagrams with which the second of your two articles is illustrated. If our classification is not quite so elaborate as that which you describe it is no doubt, due to the difference in our procedure and practice and also the probability that in the United States there exists a greater variety of law. Be that as it may, I think you will agree, after examining the examples I have mentioned, that we have at any rate approached the problem of "finding the law" on lines not very dissimilar to those which you are advocating. Furthermore, I have reason to believe that both the Digests I have referred to may be found in the principal law libraries in the United States and thus be available for your critical examination.

Yours very truly,
ROLAND E. L. VAUGHAN WILLIAMS,
Editor.

To
Urban A. Lavery, Esq.,
Attorney at Law,
Chicago.

*"Finding the Law: Legal Classification in America—1880 to 1940." A. B. A. JOURNAL, May, 1939.
"A Formula for Finding the Law," A. B. A. JOURNAL, November, 1939

REVIEW OF RECENT SUPREME COURT DECISIONS

By Edgar Bronson Tolman*

Tariff Act of 1930—Flexible Tariff Provisions—Extent of Judicial Review

Presidential proclamation of rates of duty and of changes in classification and basis of the flexible tariff provisions of the Tariff Act of 1930, are not subject to judicial review.

United States v. George S. Bush & Co., Inc., 84 Adv. Op. 896, 60 Sup. Ct. Rep. 944. (No. 613, decided, May 20, 1940.)

Acting in conformity with the flexible tariff provisions of the 1930 Tariff Act. (Secs. 336 (a), (b), and (e)), the President issued his proclamation specifying *ad valorem* rate of duty based on the American selling price of canned clams imported from Japan. The proclamation was based upon a finding of the Tariff Commission that the statutory duty of 35% *ad valorem* on the foreign dutiable value did not equalize the difference in the cost of production of the domestic article and the Japanese article. As authorized by law the Commission recommended to the President an *ad valorem* rate based on the American selling price.

After the issuance of the proclamation respondent imported canned clams and they were appraised on the basis of the American selling price. Respondent appealed to the Court of Customs and Patent Appeals and that tribunal held the proclamation invalid because of what was declared to be an error in using as a comparison between foreign and domestic prices, an average rate of exchange for the Japanese yen during a representative period other than that of the invoice dates. The United States obtained certiorari which was granted "because of the importance of that decision to the administration of the flexible tariff provisions of the Tariff Act of 1930."

Mr. Justice Douglas delivered the opinion of the court and on the subject of exchange he said:

> "The determination of foreign exchange value was prescribed, in the procedure outlined by Congress, neither for the action of the Commission nor for that of the President. There is no express provision in the Act that the rate of exchange must be taken for the same period as the invoice prices. To imply it would be to add what Congress has omitted and doubtless omitted in view of the very nature of the problem. The matter was left at large. The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production."

Speaking of the long recognized powers which Congress had entrusted to the President in the Act under consideration and prior tariff acts for more than a century it was said:

> "Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. In substance and to a great extent in form . . . the action of the Commission and the President is but one stage of the legislative process. . . . "No one has a legal right to the maintenance of an existing rate or duty." . . . And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."

On the authority of Mr. Justice Story it was declared that whenever a statute gives discretionary power to any person, to be exercised by him upon his own opinion as to the facts, the statute constitutes him the "sole and exclusive judge of the existence of those facts," judicial power to review action in those circumstances was therefore denied and on this point the opinion concluded as follows:

> "For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.
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> "The other points raised are so unimportant as not to merit discussion."

The judgment of the Court of Customs and Patent Appeals was reversed.

Mr. Justice McReynolds was of the opinion that the judgment below should be affirmed.

Mr. Attorney General Robert H. Jackson and Mr. Warner W. Gardner argued the case for the Petitioner. Mr. George R. Tuttle argued the case for the Respondent.

National Labor Relations Board—Its Jurisdiction—Extent of Judicial Review

The jurisdiction of NLRB to deal with a labor dispute attaches, even though the industry in question moves in interstate commerce only a relatively small percentage of its capacity.

Jurisdiction attaches before actual industrial strife materializes since the purpose of Congress was to protect commerce from obstructions due to industrial strife. Orders of the board may not be questioned or reversed if there is substantial evidence in support of the board's findings.

National Labor Relations Board v. Bradford Dyeing Association, 84 Adv. Op., 847, 60 Sup. Ct. Rep. 918. (No. 588, decided May 20, 1940.)

The Textile Workers Organizing Committee of a labor union (herewith called T.W.O.C.) undertook to organize the employees of the Bradford Dyeing Association.

That Association met this effort by endeavoring to

(Note: All Supreme Court decisions rendered from the recessing of Court on May 20, 1940, up to and including Monday, June 3, are reviewed or summarized in this issue of the Journal. On June 3 the Court recessed until October.)

*Assisted by James L. Homire and Leland L. Tolman.

promote an organization of its own employees named Bradford Dyeing Association Employees Federation, hereinafter called "Federation".

T.W.O.C. filed a complaint before the National Labor Relations Board that the employer refused to bargain collectively and that it had discharged two of its employees because of activity in the fight. The "Federation" intervened and an extensive hearing was held. The Board found that "a labor dispute" had arisen which would affect "the flow of commodities in interstate commerce," that the Board therefore had jurisdiction over the dispute and that the charges of the complaint had been substantiated. The Board issued a cease and desist order forbidding the respondent to (1) interfere or coerce its employees in the exercise of their rights of self-organization, (2) dominate and interfere with the federation, (3) discourage membership in T.W.O.C., (4) and that it re-employ and make whole the discharged employees, and bargain collectively through T.W.O.C.

The Circuit Court of Appeals declined to decree enforcement of that order on the ground that the findings were not supported by substantial evidence. In its final decree the Circuit Court of Appeals directed that substantial portions of the order of the Board be vacated, that a new election for employee representation be had, and that the discharges of the two employees above referred to be approved.

The Board brought this controversy before the Supreme Court by petition for certiorari, which was allowed because "questions of grave, public importance affecting the administration of the National Labor Relations Act and judicial review as provided in the act" were involved.

The opinion of the court was delivered by MR. JUSTICE BLACK. As to jurisdiction after review of the relevant evidence on that point he said:

> "That this evidence was abundantly sufficient to justify exercise of jurisdiction by the Board is not now open to controversy. It is settled that the Act is applicable to a processor, who constitutes even a relatively small percentage of his industry's capacity, where the materials processed are moved to and from the processor by their owners through the channels of interstate commerce, and it is not material, as the court below thought, that respondent's customers might be able to secure the same services from other Rhode Island processors if a labor dispute should stop the interstate flow of materials to and from respondent's plant. Since the purpose of the Act is to protect and foster interstate commerce, the Board's jurisdiction can attach, as here, before actual industrial strife materializes to obstruct that commerce."

MR. JUSTICE BLACK then reviewed the evidence as to the discharge of the employees in question and the charge of domination, the controversy as to the election of the bargaining agent, and the charge of unlawful conduct on the part of those employees in the incitement of a "sit-down strike." The learned Justice summarized the intent of Congress as follows:

> "Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a 'hearing,' which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required."

On the right of judicial review he said:

> "Mindful of the separate responsibilities Congress has imposed upon the Board and the courts, we have carefully scrutinized this entire record. . . . The Board and its representatives solicitously guarded respondent's and intervenor's right to a full and fair hearing; manifested liberality in ruling upon evidence proposed by both sides; and conducted the proceedings in a manner calculated to bring about a just result. And as we have pointed out, substantial evidence supported the result which the Board did reach. Notwithstanding, the court below declined to order enforcement of the Board's order, and the implications of its opinion are that the board without a proper regard for either the limitations on its power or the evidence made findings all of which had no substantial support.
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> "In refusing to enforce the Board's order, the court exceeded the power given it. The cause is reversed and remanded with directions to enforce the Board's order without conditions or qualifications."

MR. JUSTICE MCREYNOLDS took no part.

Mr. Attorney General Robert H. Jackson and Mr. Charles Fahy argued the case for the National Labor Relations Board, and Mr. Harry P. Cross and Mr. William G. Feely argued the case for the employer.

Federal Statutes—Bituminous Coal Act of 1937—Administration Agencies—Res Judicata

Congress may create a Governmental Agency to regulate the interstate sale and distribution of coal, prescribe maximum and minimum prices and eliminate unfair competition. It may create regional producers' organizations, and levy excise taxes and exempt therefrom producers who become members of producers organizations, cooperate with the governmental agency, and comply with its orders. It may ascertain and determine the kind of coal produced, determine whether it is "bituminous" as defined in the act and grant or deny exemptions from those taxes. Action thus authorized by the act is not an invalid delegation of legislative or judicial authority. It does not offend against the Fifth Amendment.

Sunshine Anthracite Coal Co. v. Adkins, Collector, 84 Adv. Op. 825; 60 Sup. Ct. Rep. 907. (No. 804, decided May 20, 1940.)

The labor provisions of the Bituminous Coal Conservation Act of 1935 were held unconstitutional by the Supreme Court, in the *Carter* case. The Bituminous Coal Act of 1937 was thereupon enacted to eliminate the unconstitutional provisions of the earlier act. This case dealt with the constitutionality of the later act and held it to be valid.

That act authorizes the National Bituminous Coal Commission to regulate the sale and distribution of bituminous coal with the cooperation of the bituminous coal industry. Its aim is the stabilization of the industry through price fixing and the elimination of unfair competition. It provides that producers who accept membership shall be organized under the bituminous coal code into twenty boards of code members to operate as an aid to the commission but subject to its surveillance and authority. Each board may propose prices and the commission may approve or modify them. The sale, delivery, or offer of coal below the minimum or above the maximum prices established by the commission is a

violation of the code. Code membership may also be revoked for wilful violation of the code or any regulation made thereunder.

An excise tax of one cent per ton was imposed on the sale of coal and an additional 19½% tax was made subject to the application of the conditions and provisions of the code. Producers who are members of the code are exempt from that tax. The vital question was the interpretation of the taxing provisions.

Machinery is provided for obtaining exemptions by those who consider that any commerce in coal is not subject to the act. Provision is made for a hearing on applications for exemption on due notice with the right of all applicants to be heard. The findings of the commission as to the facts, if supported by substantial evidence, are made conclusive. Appellant, a lessee of coal lands, mined and shipped coal, but did not become a member of any coal code. Its application for exemption was on the ground that its coal was not bituminous as fixed in the act.

A public hearing was held by the commission. The applicant appeared, introduced evidence and was heard on oral argument. The commission handed down an opinion with findings of fact and conclusions at law and denied the exemption.

Review of that order was sought in the Circuit Court of Appeals, where the order was affirmed.

While the above proceedings were pending before the commission, a collector of internal revenue demanded payment of the taxes and penalties accruing under the act. Whereupon the producer sought an injunction against the collection of the tax and a temporary injunction was issued by a three-judge court.

After the order of the commission was affirmed by the Circuit Court of Appeals, the reviewing officer filed a supplemental answer in the injunction suit, setting up as *res judicata* the judgment of the Circuit Court of Appeals affirming the commission's order and denying that the district court had jurisdiction. That court denied the producer's motion to strike that portion of the answer, the case was tried, the act was held constitutional and the complaint dismissed on the merits.

It comes to the Supreme Court by appeal.

MR. JUSTICE DOUGLAS delivered the opinion of the court.

Appellant argued that the 19½% tax did not apply to producers who are not members of the code because of the peculiar language of the provision on that subject. On this point MR. JUSTICE DOUGLAS said:

> "But if the 19½% tax is not applicable to non-code members, it is not applicable to anyone since § 3(b) exempts code members from that tax. That construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question. . . . .
>
> "To sustain appellant's position we would not only have to substitute 'is' for 'would be'; we would have to override the express Congressional plan to make the 19½% tax 'in aid of the regulation of interstate commerce' in bituminous coal. That would be not only to rewrite § 3(b) but to remake the whole statutory scheme. Obviously such a task is not for the courts."

Appellant challenged the constitutionality of the act on the ground that the 19½% tax was a penalty, that Congress lacked the power to fix minimum prices and that there had been an invalid delegation of legislative power. In reply to these points, MR. JUSTICE DOUGLAS said:

> "Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it."

As to appellant's point that the act violated the fifth amendment MR. JUSTICE DOUGLAS said:

> "Price control is one of the means available to the states and to the Congress in their respective domains for the protection and promotion of the welfare of the economy. But appellant claims that this Act is not an appropriate exercise of the Congressional power. It urges that the nature and use of bituminous coal in no wise endanger the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restriction of the anti-trust laws. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain. And if we undertook to narrow the scope of federal intervention in this field, as suggested by appellant, we would be blind to at least thirty years of history. For a generation there have been various manifestations of incessant demand for federal intervention in the coal industry. The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case that free competition had been 'degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink. If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would. To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. That step could not be taken without plain disregard of the Constitution.

As to the question of constitutional power and its division between the national government and the state, it was said:

> "If the industry acting on its own had endeavored to stabilize the markets through price-fixing agreements, it would have run afoul of the Sherman Act. But that does not mean that there is a no man's land between the state and federal domains. Certainly what Congress has forbidden by the Sherman Act it can modify. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire. It is not powerless to take steps in mitigation of what in its judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other. The commerce clause empowers it to undertake stabilization of an interstate

industry through a process of price-fixing which safeguards the public interest by placing price control in the hands of its administrative representative."

Concerning the objection that the act involved an invalid delegation of legislative power it was said:

"The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act and the Packers and Stockyards Act. The latter provide the standard of 'just and reasonable' to guide the administrative body in the rate-making process. The validity of that standard, the appropriateness of the criterion of the 'public interest' in various contexts, the legality of the standard of 'unreasonable obstruction' to navigation all make it clear that there is a valid delegation of authority in this case. The standards which Congress has provided here far exceed in specificity others which have been sustained. Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. But the effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues. For these reasons we hold that the standards with which Congress has supplied the Commission are plainly valid.

"Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid. *Currin* v. *Wallace, supra,* and cases cited."

Delegation of power was claimed by appellants to be involved because of indefiniteness in the definition of the term "bituminous coal." It was held that that term was no more indefinite than the term "interurban electric railway" in the Railway Labor Act, and that the failure to employ a chemist's or engineer's definition is not fatal; that the difficulty or impossibility of drawing a statutory line of definition was one of the reasons of employing merely a statutory guide.

On the question of the delegation of judicial power it was said:

"Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act. *Shields* v. *Utah Idaho Central Railroad Co., supra,* p. 180. The fact that such determination involved an interpretation of the term 'bituminous coal' is of no more significance here than was the fact that in the *Shields* case a decision by the Interstate Commerce Commission of what constituted an 'interurban' electric railway was necessary for the ultimate finding as to the applicability of the Railway Labor Act to carriers. That problem involves no more than the adequacy of the standard governing the exercise of the delegated authority. Furthermore, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under § 6(b) of the Commission's denial of its application for exemption. The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146."

As to appellant's contention that the statutory classification of coal producers into code and non-code classes and the application of the tax thereto was a discrimination prohibited by the fifth amendment, it was said:

"But the Fifth Amendment unlike the Fourteenth, has no equal protection clause. And there is 'no requirement of uniformity in connection with the commerce power.' The lack of similarity in treatment of the two classes of coal is an integral and essential feature of this Act. As we have said, it is through that device that Congress sought to obtain an effective sanction for the Act's enforcement. Coercion is the very essence of any penalty exacted for failure of submission. 'It is of the essence of the plenary power conferred' by the commerce clause 'that Congress may exercise its discretion in the use of the power.' Part of that discretion is the selection of the sanction for the law's enforcement. Discrimination constitutionally may be the price of noncompliance. 'Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.'"

MR. JUSTICE DOUGLAS gave careful attention to the point urged by appellant that the decision of the Circuit Court of Appeals affirming the order of the Commission did not constitute a basis for the application of the doctrine of *res judicata* since that decision did not involve the assessment of the taxes or the status of appellant's coal. The facts were fully examined and summarized and the learned justice said:

"The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same.' A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy."

In conclusion the learned justice said:

"The decree below subjected appellant to payment of taxes accrued or assessed against it under § 3(b) after December 4, 1939. To relieve against payment of taxes until final termination of the litigation would be to put a premium on dilatory tactics in a situation where under the authority of *Currin* v. *Wallace, Mulford* v. *Smith,* and *United States* v. *Rock Royal Co-operatives Inc.,* the subject of the Act was clearly one over which the jurisdiction of Congress was complete."

and the judgment below was affirmed. MR. JUSTICE MCREYNOLDS was of the opinion that the act under review was beyond any power granted to Congress and that the judgment below should be reversed. Mr. Henry Adamson argued the case for the appellant. Mr. Attorney General Robert H. Jackson argued the case for the appellee.

Interstate Commerce Act—Power of Commission to Prevent Unjust Discrimination

The Interstate Commerce Commission is vested with power to prevent unjust discrimination in rates charged by interstate common carriers by motor vehicle subject to the Interstate Commerce Act.

In the exercise of that power the Commission may order the cancellation of rates on less-than-truckload shipments whose practical effect is to enable freight forwarders to ship the same commodities between the same points at lower rates than shippers who do not consolidate their shipments into truckload lots.

If the Commission's order in that behalf is supported by substantial evidence its determination is conclusive.

United States v. Chicago Heights Trucking Co., 84 Adv. Op. 871; 60 Sup. Ct. Rep. 931. (No. 724, decided May 20, 1940.)

This appeal from a specially constituted federal court of three judges concerns the validity of an order of the Interstate Commerce Commission. The order cancelled certain proposed tariffs of common carriers operating motor vehicles in interstate commerce and subject to the power of the Interstate Commerce Commission under the Federal Motor Carrier Act of 1935. The Commission cancelled the tariffs upon the ground that they were unlawfully discriminatory in affording lower rates to "forwarders" of freight than to other shippers.

It is the practice of forwarders to collect small shipments in certain areas and to assemble them for shipment in carload or truckload lots in order to avail of the carload or truckload rates. The rates subject to the order applied to less than truckload shipments, and were cancelled solely because the shipments affected had previously been, or were later to be, consolidated in truckloads with other shipments. The Commission found that in practical effect the proposed tariffs which would be available to forwarders of freight could be used by few, if any, other less-than-truckload shippers. It concluded that on like traffic between the same points this would operate as an unjust discrimination in violation of §216(d) of the Interstate Commerce Act.

The District Court on the same evidence as that which was presented to the Commission reached a different view from that held by the administrative body, and held void and enjoined the enforcement of the Commission's order. On appeal the Supreme Court reversed the ruling of the District Court in an opinion by MR. JUSTICE BLACK.

The opinion summarizes the arguments made by the respondents and notes that arguments in support of the tariffs were forcibly presented in the dissenting opinions of two members of the Commission. However, the conclusion is reached that under the statute the Commission is the tribunal charged with the duty of determining whether or not discrimination existed and that if its determination was duly supported by substantial evidence it must be upheld. In support of this view, MR. JUSTICE BLACK says:

> "The Commission was impressed by the facts that the proposed rates were not in reality available to all of the shipping public and in practical effect would operate for the special benefit of the forwarders and would not benefit the owner of goods shipped; that Section 216(d) of the Act represented a manifestation of the congressional purpose in Part I, Sec. 2, and Part II, Sec. 202(a) of the Interstate Commerce Act, to prevent favoritism by insuring equality of treatment on rates for substantially similar services; and that the proposed tariff would afford 'forwarders . . . and possibly a very few large shippers . . . transportation at rates lower than the rates which . . . [would] be charged certain other shippers under substantially similar circumstances and conditions, in violation of Section 216(d).' Moved by these considerations, the Commission concluded that the mere fact that forwarders might ordinarily furnish a volume of traffic greater than but identical in kind with that furnished by individual shippers did not justify lower rates for forwarders.
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> "'It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.' And where a court substituted 'its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute.' So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination." . . .
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> "The fact that the Commission acted on its motion without complaints by individual shippers did not detract from the Commission's power to protect and maintain a transportation system free from partiality to particular shippers. The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest. Its order was the embodiment of the Commission's judgment that the proposed tariff was a discrimination prohibited by the Act. 'The judgment so exercised, being supported by ample evidence, is conclusive.'"

The case was argued by Mr. Attorney General Robert H. Jackson and Mr. A. H. Feller for the appellants, and by Mr. John R. Turney and Mr. Robert E. Quirk for the appellees.

Constitutional Law—Due Process Clause—Interference by State with Freedom of Religion

Under the due process clause of the Fourteenth Amendment a state may not subject persons to restraint in the exercise of their religious privileges. Under this principle the state may not prohibit, under penalty, the solicitation of contribution for religious purposes except upon the issuance of a license so to do by a state official, upon his finding that the cause is a religious one or a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity.

A person may not be punished by the state on a charge of the common law offense of breach of the peace, in stating his religious views on a public street, where it does not appear that his actions constituted a clear and present menace to public peace and order.

Cantwell v. The State of Connecticut, 84 Adv. Op. 836; 60 Sup. Ct. Rep. 900. (No. 632, decided May 20, 1940.)

This case deals with two questions concerning freedom of speech and freedom in the exercise of religion. The appellants, members of a religious group known as Jehovah's Witnesses, were convicted in Connecticut on the third and fifth of five separate counts charged by

information. The third count charged violation of §6294 of the General Statutes of Connecticut, and the fifth count charged the common law offense of inciting a breach of peace. The State Supreme Court affirmed the convictions on the third count and affirmed the conviction of one of the appellants on the fifth count, but allowed a new trial on the fifth count as to two of the appellants.

In the proceedings the appellants duly asserted their contentions that the charges against them could not be maintained by reason of the due process clause of the Fourteenth Amendment, because that would violate their right of freedom of speech and of the free exercise of religion. On appeal the Supreme Court reversed the judgment in an opinion by MR. JUSTICE ROBERTS.

The statute in question prohibits persons from making solicitations for any religious cause unless the cause shall have been approved by the Secretary of Public Welfare. To obtain a certificate of approval an application must be made to the Secretary, who determines whether the cause is a religious one or a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity. If the Secretary so finds, he is to approve the cause and issue a certificate to that effect, but the certificate is revocable at any time. Violation of the law is punishable by fine or imprisonment.

It appears that the appellants were engaged in an activity on Cassius Street in New Haven where they went from house to house. They were equipped with a bag containing books and pamphlets, a portable phonograph and a set of records. Each of the records introduced and described one of the books. The person called on was asked to permit playing one of the records. If permission was granted, he was asked to buy the book described. On refusal he was solicited for a contribution towards the publication of the pamphlet. If contribution was made a pamphlet was delivered on the condition it would be read. Cassius Street is thickly populated, and about 90% of the residents there are Roman Catholics. One of the phonograph records described a book entitled "Enemies" which included an attack on the Catholic religion.

The State Supreme Court construed the statutory provision to cover the activities in which the appellants were engaged and overruled their contention that it offended against the due process clause of the Fourteenth Amendment.

Taking a different view, MR. JUSTICE ROBERTS points out that the Fourteenth Amendment prohibits the states from making a law respecting the establishment of religion or prohibiting its free exercise. That the amendment embraces two concepts—freedom to believe and freedom to act. While the first of the two concepts is absolute, the second, in the nature of things, cannot be absolute, since action or conduct remains subject to regulation for the protection of society. The particular vice of the statute in question was found to lie in its provision permitting a previous restraint on the free exercise of religion in that it requires a prior application to the secretary of the public welfare council and empowers him to determine whether the cause in question is a religious one and makes issuance of a certificate dependent on his affirmative action. It is pointed out, moreover, that the state courts have never construed this action as purely administrative and, furthermore, that even if his action is subject to judicial correction, the previous restraint is nevertheless inadmissible. Discussing these aspects of the case, MR. JUSTICE ROBERTS says:

"The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the State court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

"Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."

The opinion then takes up the question of the propriety of the conviction on the fifth count charging the common law offense of inciting a breach of the peace. The Court again recognizes that the state has a legitimate interest to protect in the preservation of peace and order. But an examination of the record led to the conclusion that the conduct of the appellant did not raise such a clear and present menace to the public peace as to render him subject to conviction of the common law offense charged against him. As to this, the opinion says, in part:

"We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

"The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

"Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a

statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."

The case was argued by Mr. Hayden C. Covington for the appellants, and by Mr. Edwin S. Pickett and Mr. Francis A. Pallotti for the appellee.

Bankruptcy Act—Corporate Reorganizations Under Chapters X and XI

The petition of a large corporation with publicly held securities for an arrangement respecting its unsecured debts under Chapter XI of the Bankruptcy Act should be dismissed where it appears that relief under that Chapter would be inadequate and proceedings under Chapter X would provide adequate relief and afford the means of reorganization under a fair, equitable and feasible plan.

In proceedings under Chapter XI it is proper for the district court to permit the Securities and Exchange Commission to intervene, and to raise and litigate the question as to the adequacy of relief obtainable under that Chapter in order to prevent the defeat of the functions which the Commission is charged with performing under Chapter X.

Securities and Exchange Commission v. United States Realty and Improvement Company, 84 Adv. Op. 966; 60 Sup. Ct. Rep. 1044. (No. 796, decided May 27, 1940.)

Two questions were considered and disposed of in this case: (1) Whether the respondent's petition for an arrangement of unsecured debts under Chapter XI of the Bankruptcy Act should be dismissed because the relief obtainable thereunder is inadequate; and (2) whether the Securities and Exchange Commission is entitled to litigate that question by intervention and appeal.

The respondent is a New Jersey corporation doing a real estate business in New York. It has 900,000 shares of no-par stock outstanding which are listed on the New York Stock Exchange and are held by some 7,000 holders. It has liabilities of $5,051,416 of which only $74,916 is current. The debt includes two series of publicly held debentures aggregating $2,339,000 maturing January 1, 1944. These are secured by a pledge of corporate stock of little value and a $3,000,000 note due August 12, 1939, secured by a first mortgage owned by the respondent. The respondent is also liable as a guarantor of principal, interest, and sinking fund payments under $3,710,500 mortgage certificates issued by its wholly owned subsidiary, Trinity Building Corporation of New York, held by some 900 holders. These certificates have been in default since January 1, 1939. They are secured by mortgage on the realty and buildings which are Trinity's only substantial assets. Since 1936 the respondent has suffered a yearly net loss, and is unable to pay its debts as they mature.

Before maturity of the mortgage certificates the respondent and Trinity proposed to the holders a plan for modification of the obligation, leaving the respondent's other indebtedness and stock unaffected. The plan provided for an extension of the maturity date, reduction in interest rate, and modification of the sinking fund. The respondent's guaranty was to apply to the extension and interest as modified, but was to be eliminated as to the sinking fund. Two legal proceedings were to implement the plan: (1) A petition for an "arrangement" by the respondent under Chapter XI of the Bankruptcy Act, and (2) a proceeding under a New York statute (the Burchill Act) by Trinity for modification of the mortgage certificates. The plan provided that modification of the respondent's guaranty should stand, even though the state court should fail to confirm the modification of the certificates.

When consent of 55% in number and amount of the certificate holders had been obtained, the proceeding under review was started in the District Court for Southern New York under Chapter XI, May 31, 1939. That court found the petition properly filed and directed that the respondent continue in possession. July 18, 1939, the court permitted the Securities and Exchange Commission to intervene. The latter moved to vacate the order approving the debtor's petition, to dismiss the proceedings and to deny confirmation of the proposed arrangement. These motions were denied, and the cause was referred to a referee.

The Commission appealed from the several orders and the respondent appealed from the order permitting the Commission to intervene. The appeals were consolidated and heard together and the Circuit Court of Appeals reversed the order permitting the Commission to intervene and dismissed the petition of the Commission. On certiorari these orders were reversed by the Supreme Court by a divided bench. MR. JUSTICE STONE delivered the prevailing opinion.

This opinion summarizes the view of the Circuit Court of Appeals which was that the proceeding was properly brought under Chapter XI; that the Commission was not authorized by the Bankruptcy Act to intervene; that it had no interest entitling it to intervene under the federal rules respecting intervention and consequently was disentitled to maintain an appeal.

The Commission contended that Chapter X of the Bankruptcy Act provides the exclusive procedure for reorganization of a large corporation with publicly held securities and that consequently the District Court had no jurisdiction to entertain the petition under Chapter XI; that in any case that court should have dismissed the petition because under the circumstances no fair and equitable arrangement could be consummated affecting the respondent's unsecured creditors alone as contemplated by Chapter XI; that in these circumstances the Commission was properly allowed to intervene in order to protect the public interest as contemplated by Chapter X.

In opposition to this the respondent argued that, although it is a large corporation with publicly held securities, it is within the literal terms of Chapter XI which unqualifiedly authorizes a debtor to petition under that Chapter for an arrangement with respect to its unsecured debt and that the District Court was bound to entertain the petition however desirable it might be that the reorganization should proceed under Chapter X.

Upon an analysis of Chapter XI the Court recognizes that it confers on the District Court jurisdiction over the petition for an arrangement, at least in the technical sense, that it confers power to make orders not open to collateral attack. But the question remained whether it could, with propriety, exercise jurisdiction in the face of the contention that Chapter X alone affords a remedy adequate to protect public and private interests in a large corporate reorganization involving publicly held securities.

In answering this question the opinion cites the purpose of Chapter X and its predecessor, §77B, to provide control over security holders' committees, the formulation of reorganization plans and make available expert administrative assistance. It is observed that these safeguards are not provided by Chapter XI. Other important differences between a proceeding under Chapter XI and one under Chapter X are also cited, particularly the fact that in a proceeding under Chapter XI no scope is allowed for an arrangement which affects a subsidiary

or alters the rights of secured creditors and stockholders, leaving only the debtor's unsecured debts subject to modification.

In the light of these and other differences the Court concludes that the District Court, sitting as a court with equity powers and in the exercise of a sound discretion, should have dismissed the petition. In stating the majority view on this point, MR. JUSTICE STONE says:

"A bankruptcy court is a court of equity, §2, 11 U. S. C. § 11, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. . . . A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. It may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer. . . . Before the provisions for alternative remedies were brought into the Bankruptcy Act by Chapters X and XI the occasion was rare when a court could have felt free to deny a petition in order to serve some public or collateral interest at the expense of the petitioner's right to an adjudication. But here respondent, if dismissed, need not go without remedy. All that he can secure rightly or equitably in a Chapter XI proceeding is to be had in a Chapter X proceeding. The case stated most favorably to respondent is that it has proposed an arrangement which appears on its face not to be 'fair and equitable' and hence not to be entitled to confirmation under Chapter XI. Respondent's circumstances, as disclosed by its petition and proposed arrangement, are such as to raise a serious question whether any fair and equitable arrangement in the best interest of creditors can be effected without some rearrangement of its capital structure. In any case that and subsidiary questions cannot be answered in the best interest of creditors without recourse to the procedure of a Chapter X proceeding. Pending the litigation respondent seeks to stay the hand of its creditors and in the meantime to avoid that inquiry into its financial condition and practices and its business prospects, provided for by Chapter X without which there is at least danger that any adjustment of its indebtedness will not be just and equitable, and that its revived financial life will be too short to serve any public or private interest other than that of respondent.

"In this situation, we think the court was as free to determine whether the relief afforded by Chapter XI was adequate as it would have been if respondent had filed its petition under Chapter X. What the court can decide under §146 of Chapter X as to the adequacy of the relief afforded by Chapter XI, it can decide in the exercise of its equity powers under Chapter XI for the purpose of safeguarding the public and private interests involved and protecting its own jurisdiction from misuse. Here, we think it was plainly the duty of the district court in the exercise of a sound discretion to have dismissed the petition remitting respondent if it was so advised to the initiation of a proceeding under Chapter X, in which it may secure a reorganization which, after study and investigation appropriate to its corporate business structure and ownership, is found to be fair, equitable and feasible, and in the best interest of creditors."

As to the Commission's standing in the case, the Court states that the question is not whether it could intervene as of right, but rather whether there had been an abuse of discretion to permit it to intervene. The conclusion is reached that it was properly permitted to intervene under Rule 24 of the Rules of Civil Procedure. As to this, the opinion says:

"Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by paragraph 37 of the General Orders for Bankruptcy, authorizes 'permissive intervention.' It directs that 'upon timely application any one may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.' This provision plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. . . . If, as we have said, it was the duty of the court to dismiss the Chapter XI proceeding because its maintenance there would defeat the public interest in having any scheme of reorganization of respondent subjected to the scrutiny of the Commission, we think it plain that the Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it."

The right of the Commission to appeal from the order refusing to dismiss is also sustained.

MR. JUSTICE ROBERTS delivered a dissenting opinion, with which the CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS agreed. The opinion stresses the fact that the proceeding under review came precisely within the terms of Chapter XI, and that the legislative history of the Chapter gives scant support to the Commission's contention. In this connection, the minority opinion states:

"When all is considered it is evident that little support for the Commission's argument can be gained from the legislative history. It is of no avail to urge that it would have been far better for Congress to adopt a different scheme, and that the public interest which Congress had in mind in writing chapter X extends quite as much to a composition such as that proposed in the instant case as to the reorganizations envisaged in chapter X. These considerations may well be urged upon Congress in support of an amendment of the statute but they can have no weight with a court called upon to apply its plain language."

The dissent also considers the relation of the bankruptcy court's equity powers to the problem presented, and urges that those powers have never been invoked to refuse the relief which Congress has accorded a bankrupt. In development of this aspect, MR. JUSTICE ROBERTS says:

"Another argument put forward is that, as courts of bankruptcy are courts of equity, they may, as a chancellor might in the case of a bill for receivership, find that the balance of convenience requires a refusal to exercise a jurisdiction possessed. I think this is a complete misapplication of the principle that a court of bankruptcy is a court of equity. That has been many times stated but never in connection with the right of a debtor to invoke the remedy provided by Congress in the bankruptcy laws. The legislature has specified who is entitled to the relief provided by the statute and in what circumstances. The court has no power to refuse that relief on the ground that some other relief would better serve the purpose. What is meant by the statement that a court of bankruptcy is a court of equity is that its function is to make an equitable distribution of the estate among the creditors, but the principle has not been applied in the sense that the court may, in its better judgment, refuse to award the relief which Congress has accorded the bankrupt."

The view is taken also by the minority, that the Commission was not entitled to intervene as of right or otherwise.

MR. JUSTICE DOUGLAS did not participate in this case.

The case was argued by Mr. Solicitor General Biddle for the petitioner, and by Mr. Joseph M. Hartfield and Mr. Henry M. Marz for the respondent.

Income Taxes—Income From Oil and Gas Production—To Whom Taxable

Under a contract for the sale of oil and gas properties part of the purchase price was to be paid out of one-half of the proceeds of future oil and gas production and future sales of the property itself, and the seller was to have a lien on one-half of the oil and gas production and on one-half of the fee interest. Upon the execution of the contract for sale the properties were conveyed to the purchaser without reservation of any title.

In these circumstances the gross proceeds derived from the oil production are taxable as income to the purchaser. The reservation of security in the form of a lien on the proceeds from sales of fee interests distinguishes the case from Thomas v. Perkins, 301 U. S. 655, and the rule of that case is not to be extended beyond cases where the reserved payments are to be derived solely from the production of oil and gas.

Anderson v. Helvering, 84 Adv. Op. 876; 60 Sup. Ct. Rep. 952. (Nos. 682, 683, decided May 20, 1940.)

This case involves questions under the Revenue Act of 1932 as to whom income from the production of oil and gas is taxable and as to whom depletion deductions are allowable.

The petitioner, Pritchard, acting for himself and others, in 1931 contracted with Oklahoma City Company for the conveyance to him of royalty interests, fee interests, and deferred oil payments in properties for an agreed consideration of $160,000. Of this amount $50,000 was payable in cash and $110,000 from proceeds to be received by the purchasers from the production of oil and gas *and from the sale of fee title* to any or all of the lands conveyed, with 6% interest, also payable from the proceeds. Oklahoma Company was to have a first lien against one-half of all the oil or gas produced and against the fee interest from which the $110,000 was payable, the lien, however, not to affect the other one-half interest. The gross proceeds were to be paid directly to Pritchard who was to deposit one-half of them to the credit of the Oklahoma Company. The agreement recited that the Oklahoma Company desired to sell "all of its right, title and interest of whatsoever nature" in the property described. A copy of the agreement and a release were placed in escrow for delivery to the purchasers upon payment of the balance. Immediately on the execution of the contract the properties were conveyed to the petitioner without reservation.

The gross proceeds from production and sale of oil and properties in 1932 amounted to some $81,000. Pritchard deposited one-half of this to the credit of Oklahoma Company in accordance with the contract. The question for decision was whether the proceeds thus paid over to the Oklahoma Company should be included in the gross income of petitioners for the year 1932. The Board of Tax Appeals and the Circuit Court of Appeals ruled that the amount of the proceeds thus paid over to the Oklahoma Company should be included in the income of the petitioners. On certiorari this ruling was affirmed by the Supreme Court in an opinion by MR. JUSTICE MURPHY.

The opinion states that the questions as to whom the income is taxable and as to whom a deduction for depletion is allowable are determined by the same basic issue, namely, who has the capital investment in the oil and gas in place, and what is the extent of that interest.

In determining this issue the Court considers the practical consequences of the transaction and concludes that in the instant case the petitioners were to be regarded as the owners of the oil and gas in place and, consequently, taxable with respect to the gross proceeds derived from oil production, including amounts received and paid over to the seller in accordance with the contract. In reaching this conclusion particular emphasis is placed upon the feature that the deferred payments to the Oklahoma Company were not dependent entirely upon the production of oil, but were also payable from sales of the fee title to the lands conveyed. Emphasizing this feature as distinguishing the present case from *Thomas v. Perkins*, 301 U. S. 655, and expressing the view that the rule of that case should not be extended beyond a situation where the deferred payments are to be derived solely from the production of oil and gas, MR. JUSTICE MURPHY says:

> "The reservation of an interest in the fee, in addition to the interest in the oil production, however, materially affects the transaction. Oklahoma Company is not dependent entirely upon the production of oil for the deferred payments; they may be derived from sales of the fee title to the land conveyed. It is clear that payments derived from such sales would not be subject to an allowance for depletion of the oil reserves, for no oil would thereby have been severed from the ground; an allowance for depletion upon the proceeds of such a sale would result, contrary to the purpose of Congress, in a double deduction—first, to Oklahoma Company; second to the vendee-owner upon the production of oil. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U.S. 312, 321. We are of opinion that the reservation of this additional type of security for the deferred payments serves to distinguish this case from *Thomas* v. *Perkins*. It is similar to the reservation in a lease of oil payment rights together with a personal guarantee by the lessee that such payments shall at all events equal the specified sum. In either case, it is true, some of the payments received may come directly out of the oil produced. But our decision in *Thomas* v. *Perkins* does not require that payments reserved to the transferor of oil properties shall for tax purposes be treated distributively, and not as a whole, depending upon the source from which each dollar is derived. An extension of that decision to cover the case at bar would create additional, and in our opinion unnecessary, difficulties to the allocation for income tax purposes of such payments and of the allowance for depletion between transferor and transferee. In the interests of a workable rule, *Thomas* v. *Perkins* must not be extended beyond the situation in which, as a matter of substance, without regard to formalities of conveyancing, the reserved payments are to be derived solely from the production of oil and gas. The deferred payments reserved by Oklahoma Company, accordingly, must be treated as payments received upon a sale to petitioners, not as income derived from the consumption of its capital investment in the reserves through severance of oil and gas.
>
> "Petitioners, as purchasers and owners of the properties, are therefore taxable upon the gross proceeds derived from the oil production, notwithstanding the arrangement to pay over such proceeds to Oklahoma Company."

The case was argued by Mr. Charles H. Garnett for the petitioners, and by Mr. J. Louis Monarch for the respondent.

Statutes—Schools—Flag Salute—Civil Liberties

Religious Liberty is a right which can be questioned only when the conscience of individuals collides with the necessities of society. That right, like freedom of speech, is relative—not absolute.

A state statute which requires children in its free schools to salute the Flag, does not offend against the Fourteenth Amendment.

Minersville School District v. Gobitis, 84 Adv. Op. 993, 60 Sup. Ct. Rep. 1010. (No. 690, decided June 3, 1940.)

Two children of a family affiliated with a religious sect called "Jehovah's Witnesses" refused to join in a ceremony required by the law of Pennsylvania to be performed by teachers and pupils of its free public schools. The ritual consisted of a salute to the Flag and a pledge of allegiance to the Republic for which it stands.

The children had been brought up to believe the tenets of the sect, one of which was that the prescribed salute and pledge of allegiance was forbidden by the scriptural injunction contained in Chapter 20 of the Book of Exodus: "Thou shalt have no other Gods before me . . ."

For continued refusal to participate in that ceremony the children were expelled from school, and the father brought suit to enjoin the school authorities from continuing to exact participation in the flag-salute ceremony as a condition of his children's attendance at the Minersville school.

The district court granted that relief and the Circuit Court of Appeals affirmed. The Supreme Court granted certiorari, and reversed.

The American Bar Association Committee on the Bill of Rights and the American Civil Liberties Union filed briefs as friends of the court.

MR. JUSTICE FRANKFURTER delivered the opinion of the court. The opening sentence of that opinion discloses the serious frame of mind in which he approached the dilemma presented by the clash of two great principles. He said:

> "A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy."

After his review of the facts he said:

> "We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment."

Of the right of individual liberty to worship God according to one's personal convictions he said:

> "So pervasive is the acceptance of this precious right that its scope is brought into question, as here, only when the conscience of individuals collides with the felt necessities of society."

But as to the relativity of that right his argument was presented as follows:

> "But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men. When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? . . . The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others—even of a majority—is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. . . . Our present task then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith. . . . The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized." (citing the Selective Draft Law cases and others).

As to those cases he said:

> "'In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom."

Coming down to the particular question involved in this case, namely "whether children like the Gobitis children must be excused from conduct required of all other children in the promotion of national cohesion he said:

> "We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. . . . The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that '. . . the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense . . . it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.' . . .
>
> "The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious."

He declared that the court room was not the arena for debating educational policy and said:

"So to hold would make us the school board for the country. That authority has not been given to this court nor should we assume it. . . . The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate. And the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power. . . . What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote. Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained —so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law."

The case was reversed. MR. JUSTICE MCREYNOLDS concurred in the result. MR. JUSTICE STONE dissented.

The grounds of the dissent are best shown by the following quotations:

"The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion, which concededly are forbidden by the First Amendment and are violations of the liberty guaranteed by the Fourteenth. For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions. . . . Concededly the constitutional guaranties of personal liberty are not always absolutes. Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end it may compel citizens to give military service, and subject them to military training despite their religious objections. It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience. . . . there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions. . . . History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. . . . And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion. The very terms of the Bill of Rights preclude, it seems to me, any reconciliation of such compulsions with the constitutional guaranties by a legislative declaration that they are more important to the public welfare than the Bill of Rights. . . . The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. . . . With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

As to the place of the flag-salute in a school system he said:

"That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.

"The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feeling which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties."

He declared judicial review to be "a fundamental part of our constitutional scheme," but that to the legislature no less than to the courts "is committed the guardianship of deeply cherished liberties." In closing the opinion he said:

"To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."

The case was argued on April 25, by Mr. Joseph W. Henderson for petitioners and by Mr. Joseph F. Rutherford and Mr. George K. Gardner for respondents.

State Compacts—Eminent Domain—Consequential Damages

The Pennsylvania-New Jersey Compact and the New Jersey act therein referred to, authorize the ascertainment by eminent domain proceedings, of the value of land taken. They do not embrace the ascertainment or award of consequential damages to land not taken.

Delaware River Joint Toll Bridge Commission v. Colburn, 84 Adv. Op. 949, 60 Sup. Ct. Rep. 1039. (No. 563, decided May 27, 1940.)

New Jersey and Pennsylvania by action of their respective legislatures, Congress consenting entered into a Compact for the construction of bridges over the Delaware River between those states.

The Compact created a "body corporate and politic" (hereinafter called "Commission") and gave it power

to acquire real property for bridge purposes by purchase or by eminent domain proceedings.

The Commission purchased land for abutments and approaches in Eastern Pennsylvania and Phillipsburg, New Jersey and bridged the river there. The Phillipsburg abutment, adjoined the rear of certain private property not purchased or condemned. The owners of that property claimed that the abutments interfered with their rights of access, light, and air, and brought suit in the New Jersey Supreme Court to compel the Commission to take proceedings for the ascertainment and award of compensation for damages resulting from the construction of the abutment. A special jury found for the owners on the issue of deprivation of access and of light, air, and view. The court held that the compact and a statute of New Jersey, passed in 1912 therein referred to, construed together, required the Commission to compensate for the damages. Mandamus was awarded directing the relief prayed.

The Commission appealed to the New Jersey Court of Errors and Appeals where the decision of the state supreme court was affirmed. Certiorari was allowed because of public importance of the questions involved.

The Commission will hereafter be called "petitioner" and the property owners "respondents." The first question was one of jurisdiction of the Federal Supreme Court to review the judgment of the state court construing the Compact between the states. That right had been denied in an early case. (*People v. Central Railroad*, 12 Wall 455.) The case had long been doubted and it was now concluded:

> "that the construction of such a Compact sanctioned by Congress by virtue of Article I, Section 10, Clause 3 of the Constitution involves 'a federal title, right, privilege, or immunity,' which . . . may be reviewed here on certiorari. . . ." (Citing many cases.)

Apart from the New Jersey statute above referred to the New Jersey courts have held that there is no right of recovery for the consequential damages here claimed.

The Compact was analyzed, its relevant provisions quoted, and the examination of those provisions was summarized as follows:

> "It will be noted that the effect of these provisions is to authorize the Commission to acquire 'real property' by purchase or by eminent domain, and that by definition real propery includes 'interests in land' which are so defined as to include 'claims for damage to real estate,' and that, where resort to eminent domain is needful for the acquisition of such interests, the exercise of that power is to be 'in the manner provided' in the New Jersey statute of 1912 as amended. By its terms the Compact confers upon the Commission the power to acquire the specified interests in land or relating to land, conditioned upon payment for the interests acquired, an amount agreed upon or fixed by proceedings in eminent domain. Beyond this it imposes no duty or obligation on the Commission to compensate for damages inflicted by its acts, but leaves the Commission subject to such liability as is imposed by the law of the state within which the Commission acts."

The court next examined the New Jersey statute of 1912 referred to in the Compact and held that it did not enlarge the duties or liabilities of the Commission; that it prescribed a procedure for the ascertainment of the value of the property taken but did not include that of consequential damages; that under the general applicable decisions of the statutes of New Jersey the Commission is without liability to pay consequential damages. This phase of the case was expounded as follows:

> "It is plain that, under the Compact, without reference to that legislation, the Commission could have acquired land by purchase and built a bridge upon it without subjecting itself to liability for consequential damages. But it was necessary that a procedure should be adopted for the exercise of the power of eminent domain conferred on the Commission by the Compact and this was done by the provision of the Compact that 'the Commission may acquire such property by the exercise of the right of eminent domain, in the manner provided' by the 1912 Act. Under the Compact that Act is given effect only to the extent that it affords a manner or procedure of exercising the right of eminent domain, which is called into operation only if the Commission is unable to acquire needed property by purchase and then only as a means of fixing the compensation which, under the Compact, the Commission is required to pay. The Compact can be given a more extensive effect only by disregarding its language and by attributing to its draftsmen an intention to adopt a rule of damages not generally applicable in the state and now for the first time adopted by a construction plainly inapplicable to the acquisition of existing toll bridges to which the Act of 1912 and its amendments alone referred."

In answer to an argument made by respondent that the 1912 Act and the Compact were entitled to make the rule of damages under the Pennsylvania Constitution applicable to property similarly acquired by the Commission in New Jersey, the Pennsylvania cases were also reviewed and the opinion concluded as follows:

> "Even though it be thought that it was intended to adopt, by the 1912 Act, the then prevailing interpretation of the Pennsylvania constitutional provision, that fact could have no force here, both because the constitutional provision has never been regarded by the Pennsylvania courts as applicable to the use of land acquired by purchase and because the Compact by its terms excludes the 1912 Act from its operation except in so far as it affords a manner or method of procedure when the Commission resorts to eminent domain."

The judgments of the state courts were reversed.

The case was argued by Mr. Edward B. Stout for petitioner and by Mr. Egbert Rosecrans for respondents.

Statutes—Sherman Anti-Trust Act—Labor Disputes

A "Sit-down strike," maintained to enforce union demands by compelling the shutdown of the employer's factory, of which the natural and predictable consequence, and the only effect upon trade or commerce was to prevent substantial shipments interstate by the employer, is not the kind of restraint in trade or commerce which the Sherman Anti-trust law condemns.

While labor unions are to some extent and in some circumstances subject to the Sherman act, the act does not apply to all labor union activities affecting interstate commerce.

The restraints for which the Sherman law provides a remedy are only those which are comparable to restraints deemed illegal at common law and which have or are intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.

Apex Hosiery Co. v. Leader, 84 Adv. Op. 913, 60 Sup. Ct. Rep. 982. (No. 638, Decided May 27, 1940.)

Suit was brought in the Federal District court for the Eastern District of Pennsylvania by a Pennsylvania Hosiery manufacturer against a labor union and its officers to recover treble damages under the Sherman

Act for injuries sustained by it from sit-down strikes conducted in its factory by the union.

The jury returned a verdict for the manufacturer. On appeal, the Court of Appeals for the Third Circuit reversed on the ground that the interstate commerce restrained by the acts of the union was unsubstantial since the total shipments from the factory amounted to less than 3% of the total value of the output of the entire industry in the country, and on the ground that the evidence had not shown any intent of the union to restrain interstate commerce.

The Supreme Court granted certiorari because of the importance of the questions in the Administration of the Sherman Act. It concludes that the judgment of the court of appeals must be affirmed.

MR. JUSTICE STONE delivered the opinion of the court. He begins by an enumeration of facts which the evidence shows the jury could have found. The Company employed about 2500 persons in the manufacture of hosiery in its Philadelphia factory. Its principal raw materials were silk and cotton shipped to it from outside the state. Eighty per cent of its products were shipped interstate. Only eight of its employees were union members. The union had demanded a closed shop agreement and when its demand was refused, and its factory shut down, union members in other Philadelphia factories gathered at its plant, a sit-down strike was declared and the union forcibly seized the plant organizing the members as sit-down strikers in possession of the plant. Locks in the factory were changed, and only sit-down strikers given keys. No others were allowed to leave the building and the strikers wilfully wrecked machinery and did extensive damage to other property. The company was forced to cease all manufacture and could not resume it until long after the strike had been ended by an injunction of the court of appeals for the third circuit. During that period the flow of the product into interstate commerce was completely stopped by the strikers' occupation of the factory. Three times in the course of the strike the union refused company requests to be allowed to remove merchandise for the purpose of shipment on its unfilled orders, 80% of which were to points outside the state. The opinion characterizes the union activities as follows:

> "The record discloses a lawless invasion . . . and destruction of property by force and violence of the most brutal and wanton character."

and continues by observing that the court may assume that the union:

> "By substituting the primitive method of trial by combat for the ordinary processes of justice and more civilized means of deciding an industrial dispute, violated the civil and penal laws of Pennsylvania . . . But in this suit in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal right as Congress has conferred . . . by the Sherman Act, and violence . . . however reprehensible, does not give the federal court jurisdiction."

The opinion then proceeds to remove from its consideration, as irrelevant, certain questions which had been much argued in the case. Here the opinion states agreement with the company's contention that there was abundant evidence that the effect of the sit-down strike was to restrict substantially the interstate transportation of its product so as to bring the act of the union by which restriction was affected within the congressional power over commerce. It also states agreement with the contention of the company that the jury's verdict must be taken as a finding supported by evidence that the union intended to prevent shipments in interstate commerce in the sense that it must be taken to have intended the natural and probable consequences of its acts. But, after granting these points, the opinion proceeds to point out that: "The Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate commerce. . . . This court has never applied the act to laborers or to others as a means of policing 'interstate transportation.'" The question thus limited is then stated as follows:

> "The question to which we must address ourselves is whether a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their demands against the employer is the kind of restraint of trade or commerce at which the Act is aimed, even though a natural and probable consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer."

It had been urged by the union that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act, as to this the opinion points that the court has repeatedly held that the words of the act, "Every contract, combination . . . or conspiracy in restraint of trade or commerce" do embrace to some extent and in some circumstances labor unions and their activities. It concludes that the long time failure of Congress to alter the act after this judicial construction and the enactment of legislation which impliedly recognizes the construction as effective, is persuasive of legislative recognition that the judicial construction is correct. The opinion then points out its conclusion on this point in the following language:

> "While we must regard the question whether labor unions are to some extent and in some circumstances subject to the Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce. The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed."

The opinion then turns to the construction that must be given the statutory words "restraint of trade or commerce." In this connection it states three circumstances in the history and application of the act "which are of striking significance": First, the legislative history and the judicial construction of the act show "it was not aimed at policing interstate transportation of movement of goods and property," but rather was to prevent "restraints to free competition in business and commercial transactions which tended to restrain production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." Discussing this circumstance the opinion says:

> "For that reason the phrase 'restraint of trade' which had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint

to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce. Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.'"

Second, the court has never applied the act in any case, unless it was "of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services."

Third, the court has refused to apply the act in cases in which local strikes, concluded by illegal means in a production industry, prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way.

The opinion then proceeds to consider the common law doctrines relating to contracts and combination in restraint of trade, and the applicability of those doctrines to cases arising under the Sherman act.

> "They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. Such contracts were deemed illegal and were unenforcible at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong. Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract.
>
> "In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints. . . . This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce. . . .Labor cases apart, . . . this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or affect was to raise or fix the market price. . . . Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

The opinion then proceeds to a consideration of the remaining question of the extent to which the act is applicable in Labor controversies. Its discussion of the cases on this point is premised by the following statement:

> "This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United States* v. *Brims*, 272 U. S. 549; *Local* 167 v. *United States*, 291 U. S. 293. Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so were in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals, Inc.* v. *United States*, because notwithstanding its effect upon the marketing of coal it nevertheless was not intended to and did not affect market price."

The opinion then points out that combinations of employees necessarily restrain competition among themselves for sale of their services, yet were not considered illegal as a restraint of trade at common law when the Sherman act was enacted, and that since the enactment of Section 6 of the Clayton act, declaring that labor is not an article of commerce, nor are labor organizations to be considered as combinations under the anti-trust laws, it is plain that restraints on the sale of services to the employer, however much they curtail competition among employees, are not restraints of trade under the act. It is also pointed out that although strikes may restrain the power of employer to compete with those not subject to such demands, yet under the doctrine applied in non-labor cases, that fact does not in itself constitute a violation of the act. Similarly, although the objective of any national labor organization is to eliminate price competition based on differences in labor standards, this effect has not been considered the kind of curtailment of price competition which the act prohibits.

After discussing various cases under the act where labor disputes were involved, the opinion relates:

> "It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so wide-spread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases."

In its treatment of the *Coronado* cases, and related cases, the opinion declared:

> "It perhaps suffices for present purposes to say that if the strike in the *Coronado* case was not within the Sherman Act because its effect upon the commerce was 'indirect' and because the 'intention' to shut down the mine and destroy the cars of coal destined for an interstate shipment, did not imply an 'intention to obstruct

interstate commerce,' then the like tests require the like decision here.

"But we are not relegated to so mechanical an application of these cryptic phrases in the application of the Sherman Anti-Trust Act, for the Court has since so interpreted them as to give to the phrase 'restraint of trade or commerce' a meaning and content consonant with the legislative and judicial history of the Act to which we have referred. . . .

"It was thus made apparent that in saying that 'indirect obstructions' to commerce were not condemned by the Sherman Act, where the conspiracy is not directed at that commerce, the Court was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.' And in speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' it meant no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy. . . .

"These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which were actionable under state law, and result from combinations and conspiracies which fall short both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.' These elements of restraint of trade, found to be present in the *Second Coronado* case and alone to distinguish it from the *First Coronado* case and the *Leather Workers* case, are wholly lacking here. We do not hold that conspiracies to obstruct or prevent transportation in interstate commerce can in no circumstances be violations of the Sherman Act. Apart from the Clayton Act it makes no distinction between labor and non-labor cases. We only hold now, as we have previously held both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the *Second Coronado* case."

The opinion concludes by remarking that if, without the effect on the market which the cases require, it were held that a local strike stopping shipment interests violated the act, practically every strike in modern industry would be brought within the jurisdiction of the Federal courts:

"The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence."

The judgment of the Circuit Court of Appeals was affirmed.

MR. CHIEF JUSTICE HUGHES delivered a dissenting opinion, in which he was joined by MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS.

The dissent first points out that the majority has conceded that the strike created a direct and intentional prevention of interstate commerce in the furtherance of an illegal conspiracy, and that the argument of the union that the Sherman act does not apply to labor unions, is untenable. Expressing agreement with these conclusions, the CHIEF JUSTICE states that he cannot agree that the deliberate and direct interferences with interstate commerce here disclosed are not within the scope of the act.

"As the instant case falls directly within the language of the Sherman Act in its natural import, the question is whether that language has been, or should be, so narrowed by judicial construction as to exclude from its application the conspiracy and restraint here found."

The dissent then shows that the majority has not limited the question by finding that the effect on commerce in this case was not immediate, or that the value of the interdicted shipments, constituted but a small part of the total material output of the industry. Indeed it assumes that the first consideration is established and that the second is immaterial. It also finds that the rule of reason does not help the union, since the court's opinion does not hold that the restraint was reasonable. It continues:

"Why then should the Sherman Act be construed to be inapplicable? It is said that the Act was not aimed at 'policing' interstate transportation. But this would seem to be a statement of result rather than a justification for reaching it. If 'policing' means the protection of interstate transportation from unlawful conspiracies to restrain it, it would seem that the Sherman Act provides that protection."

The CHIEF JUSTICE then proceeds to examine the early cases under the act, and observes:

"In the light of these decisions of the circuit courts and of the significant and unanimous expressions by this Court, the argument seems to be untenable that the Sherman Act has been regarded as not extending to conspiracies to obstruct or prevent transportation in interstate or foreign commerce. On the contrary, I think that hitherto it has not been supposed that such conspiracies lay outside the Act."

The majority holding that the act is not directed to those restraints which fall short of any form of market control of a commodity such as to monopolize the supply, control its prices or discriminate between its would be purchasers is then examined, and the conclusion expressed that the decisions neither require nor justify such a judicial limitation of the provisions of the act, but rather point to a contrary conclusion. In this aspect the opinion discusses, among others, the two *Coronado* cases and the *United Leather Workers* case. As to these it says:

"The *First Coronado Company* case (259 U. S. 344), chiefly relied upon, does not seem to afford an adequate basis for the broader ruling now made. That decision was centered upon the point that production, as such,—in that case, coal mining,—was not interstate commerce, and that obstruction to coal mining through a strike was not in itself a direct obstruction to interstate commerce. *Id.*, pp. 407, 408. And it was deemed to be necessary to go further and find an 'intent to injure, obstruct or restrain interstate commerce' in order to bring the case within the Sherman Act. The evidence was found insufficient to show such an intent. Thus, the Court did not decide that a direct and intentional obstruction of interstate commerce was not a violation of the Act. In the *Second Coronado Company* case (268 U. S. 295), evidence of that intent was supplied and the Court accordingly set aside a judgment in favor

of the local union. The Court not only decided the particular case but laid down the general principle as follows: 'But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.' *Id.*, p. 310. The use of the disjunctive is significant.

"The ruling of the *First Coronado Company* case as to a mere stoppage of production, in the absence of proof of a direct and intentional obstruction of interstate commerce, was repeated in the case of *United Leather Workers v. Herkert Company*, 265 U. S. 457. But the dictum from the opinion in that case, which the Court quotes in its present opinion, must be read in connection with what immediately follows where the Court pointed out that there was no direct interference by the defendants in the *Herkert* case 'with the interstate transportation' of the goods of the plaintiff company. Any doubt as to the true import of the *Coronado* and *Herker* cases is set at rest by this Court's construction of these decisions in the case of *Bedford Cut Stone Company v. Journeymen Stone Cutters Association, supra*. There the Court emphasized the point as to the absence of direct interference with interstate transportation in the earlier cases, saying (274 U. S., pp. 47, 48):

'The case, therefore, is controlled, not by *United Mine Workers v. Coronado Co., supra*, [259 U. S. 344] and *United Leather Workers v. Herkert*, 265 U. S. 457, as respondents contend, but by others presently to be discussed. In the *United Leather Workers* case, it appeared that the strikes were leveled only against production, and that the strikers (p. 471) "did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product"; and the decision rests upon the ground that there was an entire absence of evidence or circumstances to show that the defendants, in their conspiracy to coerce complainants, were directing their scheme against interstate commerce. *United Mine Workers v. Coronado Co., supra* pp. 408-409, is to the same effect.'

"And the general principle set forth in the *Second Coronado Company* case, as above quoted, was reiterated.

"In *Levering & Garrigues Company v. Morrin*, 289 U. S. 103, 107, there was no showing of a direct or intentional restraint of interstate commerce. But in *Local 167 v. United States*, 291 U. S. 293, the evidence showed a conspiracy 'to burden the free movement of live poultry into the metropolitan area' in New York. The Court said: 'The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it is in interstate commerce.' *Id.*, p. 297. Thus it was 'the untrammeled shipment and movement' which, when found to be directly and intentionally restrained, was held to constitute violation of the Sherman Act."

The CHIEF JUSTICE then discusses the need to protect the "free flow" of interstate commerce which the decisions emphasize. He points out that in order to protect this flow, the National Labor Relations Act was passed by Congress and sustained by the Court. Here it is observed that:

"It would indeed be anomalous if, while employers are bound by the Labor Act because their unfair labor practices may lead to conduct which would prevent the shipment of their goods in interstate commerce, at the same time the direct and intentional obstruction or prevention of such shipments by the employees were not deemed to be a restraint of interstate commerce under the broad terms of the Sherman Act."

The dissent concludes with the following paragraphs:

"This Court has never heretofore decided that a direct and intentional obstruction or prevention of the shipment of goods in interstate commerce was not a violation of the Sherman Act. In my opinion it should not so decide now. It finds no warrant for such a decision in the terms of the statute. I am unable to find any compulsion of judicial decision requiring the Court so to limit those terms. Restraints may be of various sorts. Some may be imposed by employers, others by employees. But when they are found to be unreasonable and directly imposed upon interstate commerce, both employers and employees are subject to the sanctions of the Act.

"It is said that such a view would bring practically every strike in modern industry within the application of the statute. I do not agree. The right to quit work, the right peaceably to persuade others to quit work, the right to proceed by lawful measures within the contemplation of the Clayton Act to attain the legitimate objects of labor organization, is to my mind quite a different matter from a conspiracy directly and intentionally to prevent the shipment of goods in interstate commerce either by their illegal seizure for that purpose, or by the direct and intentional obstruction of their transportation or by blocking the highways of interstate intercourse.

"Once it is decided, as this Court does decide, that the Sherman Act does not except labor unions from its purview,—once it is decided, as this Court does decide, that the conduct here shown is not within the immunity conferred by the Clayton Act,—the Court, as it seems to me, has no option but to apply the Sherman Act in accordance with its express provisions."

The case was argued on April 1 and 2 by Mr. Sylvan H. Hirsch for petitioner and by Mr. Isador Katz for respondents.

Summaries

Patents—Enlarged Reissues—Intervening Rights of Innocent Users

Sontag Chain Stores Co. v. National Nut Co. of California, 84 Adv. Op. 881; 60 Sup. Ct. Rep. 961. (No. 671, decided May 20, 1940.)

Certiorari to determine whether user of a nut treating apparatus manufactured and operated after grant of an original patent for a similar machine, which it did not infringe, and without knowledge of the existence of that patent, but coming within the terms of an enlarged reissue of that original patent, obtained by the owner of the original patent after he had learned of the use of the accused machine, is liable for infringement of the enlarged claims.

The Court's opinion by MR. JUSTICE MCREYNOLDS examines the authorities in some retail and lays down the general rule that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent are, in law, a dedication to the public of that which is not claimed; that this legal effect of a patent cannot be revoked unless the patentee surrenders it and proves that the specification was framed by real inadvertence, accident, or mistake; that a reissue with enlarged claims, not applied for within two years after the original, is void in the absence of extraordinary exculpating conditions and that even if the reissue is applied for within two years, it is not permissible at the expense of innocent parties.

The opinion then finds that in the case in hand, where the accused machine went into operation when its owner had no actual knowledge of the original patent, his defense to infringement, that intervening rights had been acquired by him, which in equity the owner of the reissue patent may not then disturb, is nevertheless available to him for by the patent law all patents are recorded in the Patent Office and constructive notice of their existence goes thus to all the world.

The case was argued on April 24th by Mr. Guy A. Gladson for petitioner and by Mr. Hugh N. Orr for respondent.

Statutory Construction—Enlistment Allowances—Suspension by Public Resolution 122 June 21, 1938—Legislative Intent as Aid to Statutory Interpretation

United States v. Dickerson, 84 Adv. Op. 941, 60 Sup. Ct. Rep. 1034. [No. 705. Decided May 27, 1940.]

Certiorari to the court of claims to determine whether an honorably discharged enlisted man, who upon the day after the termination of his enlisted period, on July 21, 1938, reenlisted for an additional period, may be paid an enlistment allowance under § 9 of the Act of June 10, 1933, which provided for such an allowance but which the government contended had been repealed or suspended at the time of reenlistment by reason of § 402 of Public Resolution No. 122 of June 21, 1938, which contained a proviso appended to an appropriation for the Rural Electrification Administration, that "no part of any appropriation contained in this or any other act for the fiscal year ending June 30, 1939, shall be available for the payment" of any enlistment allowance for "reenlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10," of the Act of June 10, 1922.

It was contended that this did not suspend or repeal section 9, and in support of this contention it was pointed out that its language differed from that of enactments of the preceding fiscal acts which had expressly provided that § 9 be suspended.

The Court's opinion by MR. JUSTICE MURPHY examines the Congressional record and other legislative documents concerning the purpose of the enactment and concludes from them that Congress intended in § 402 to suspend the enlistment allowance of § 9 during the fiscal year ending June 30, 1939. It points out that the inference from the adoption of different terminology is overcome by the persuasive evidence of legislative intent to the contrary and observes that while legislative materials may be without probative value, or contradictory, or ambiguous, they can not be considered as incompetent or irrelevant, since the meaning of an act of Congress can only be derived from a considered weighing of every relevant aid to construction.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS were of opinion that the judgment of the court of claims granting the allowance should be affirmed.

The case was argued on April 26th by Mr. Assistant Attorney General Shea for petitioner and Mr. Herman J. Galloway for respondent.

Admiralty—Maritime Liens—Charterer's Authority to Bind Vessel for Supplies

Dampskibsselskabet Dannebrog et al v. Signal Oil & Gas Co. of California. 84 Adve. Op. 889, 60 Sup. Ct. Rep. 937. (No. 662, decided May 20, 1940.)

Certiorari was granted here to determine whether certain chartered vessels may be libeled for maritime liens by a material-man who directly furnished the vessel with fuel under a contract with the charterer by which fuel was to be furnished to any and all vessels owned, chartered, or operated by him, when the charters covering the vessels were in the so called "government form" under which the owner provides the master and crew and undertakes the navigation of the vessel and to maintain her in efficient condition: but the master though appointed by the owner is placed under direction of the charterers as regards employment or agency and the charterer is to provide and pay for fuel supplies, port charges, piolages, etc., and all other expenses except those pertaining to the captain, officers or crew. The charters contained no prohibition against the creation of liens for necessary supplies ordered by the charterers.

The Court's opinion by MR. CHIEF JUSTICE HUGHES holds that the liens should be sustained. It examines the act of June 23, 1910, relating to maritime liens and concludes that under its provisions the governing rules are as follows:

"When the charterer has the direction and control of the vessel and it is his business to provide necessary supplies, and the charter party does not prohibit the creation of a maritime lien therefor, the material-man is entitled to furnish the supplies upon the credit of the vessel as well as upon that of the charterer and the lien is not defeated by the fact that the charterer has promised the owner to pay.

"When, however, the charter party, with knowledge of which the material-man is charged, prohibits the creation of a lien for supplies ordered by the charterer or the charterer's representative, no lien will attach."

The opinion rejects the argument that because of the contract between the material-man and the charterer that fuel requirements of all vessels owned, chartered or operated by him must be supplied by the material-man, there is an inference that only the charterer is to be looked to for payment and the creation of a lien is thus negatived. It also concludes that the lien is not prohibited because of the divided responsibility and liability which the terms of the charter imposed upon the owner and charterer. In conclusion it observes:

"The statute was intended to afford the material-man a reasonably certain criterion. The owner has a simple and ready means of protection. All that it is necessary for him to do, as the material-man in dealing with the charterer is charged with notice of the charter, is to provide therein that the creation of maritime liens is prohibited. When the owner does not do so, he should not be heard to complain when it appears that it is the charterer's business to obtain supplies to keep the vessel on her way and the charter has not prohibited reliance upon the credit of the vessel."

The case was argued on April 1st by Mr. Lane Summers for petitioners and by Mr. Glenn J. Fairbrook for respondent.

Common Carriers by Motor Vehicle—Regulation of Qualifications and Hours of Employees—Power of Interstate Commerce Commission

United States v. American Trucking Association, Inc., 84 Adv. Op. 954; 60 Sup. Ct. Rep. 1059. (No. 713, decided May 27, 1940.)

Appeal to determine whether the power of the Interstate Commerce Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of the employees of motor carriers extends to workers other than those whose duties affect the safety of operation.

The appellees contended that the power of the Commission was so extensive as to embrace employees other than those whose duties affect safe operation, and extends to clerical, storage and other non-transportation workers. The Commission and the Wage and Hour Division of the Department of Labor took a contrary view, which, if correct, would leave the non-transportation workers subject to the Fair Labor Standards Act. The question turned on the interpretation

of §13(b) of the latter Act in relation to the Motor Carrier Act, 1935, Sec. 204(a) The Fair Labor Standards Act provides—"Sec. 13(b). The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . ."

Section 204(a)(1) of the Motor Carrier Act empowers the Commission to regulate *common carriers* by motor vehicle, and "to establish qualifications and maximum hours of service of employees, and safety of operation and equipment;" to regulate *contract carriers* (Sec. 204(a)(2)) by motor vehicle, and "to establish qualifications and maximum hours of service of employees and safety of operation and equipment"; and to establish for *private carriers* (Sec. 204(a)(3)) by motor vehicles, if need therefor is found, "reasonable requirements to promote safety of operation, and to prescribe qualifications and maximum hours of service of employees, and standards of equipment . . ."

In an opinion by MR. JUSTICE REED, the Supreme Court concludes that the power of the Commission under Sec. 204(a)(1) and (2) is limited to employees whose duties affect safety of operation. In reaching this conclusion great weight is given to the previously settled policy of Congress to limit the Commission's regulatory power over the qualification and hours of service to transportation employees in matters of movement and safety only.

THE CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS were of the opinion that the decree should be affirmed for the reasons stated in the opinion of the District Court.

The case was argued by Mr. Attorney General Robert H. Jackson and Mr. Thomas E. Harris for the appellants, and by Mr. J. Ninian Beall for the appellees.

Taxation—Assessment of Valuation of Railroad Property—Requirements of Commerce, Equal Protection and Due Process Clauses

Nashville, Chattanooga & St. Louis Ry. v. Browning, 84 Adv. Op. 862; 60 Sup. Ct. Rep. 968. (No. 789, decided May 20, 1940.)

Certiorari to review a judgment of the Tennessee Supreme Court sustaining an assessment of the petitioner's property under the State's *ad valorem* tax law.

All property in the State is subject to an *ad valorem* tax; but two forms of procedure are prescribed for making assessments; one form for public service corporations and another for ordinary taxpayers. As to ordinary property, the valuation is fixed by county officials. As to public service corporations, the assessments are made by the Railroad and Public Utilities Commission which is ordered to ascertain the "actual cash value" of the property situated in Tennessee.

That Commission found that the value of the petitioner's entire system was approximately $24,000,000. The value of the property in Tennessee was fixed at approximately $13,000,000, the distribution being based upon the ratio which the petitioner's mileage in Tennessee bears to the total mileage. Both the State Board of Equalization and the Tennessee courts sustained the assessment.

On certiorari the Supreme Court affirmed the judgment in an opinion by MR. JUSTICE FRANKFURTER. The opinion first considers the petitioner's contention that Tennessee taxed values outside its borders thereby unduly burdening interstate commerce. The Court, however, rejects this contention, pointing out that an apportionment based on mileage is a frequently used and approved formula which was properly applied here.

A contention was also advanced based on the equal protection clause of the Fourteenth Amendment. In support of this contention the petitioner cited the two methods of assessment followed in Tennessee and asserted that for more than 40 years the county assessors have systematically valued ordinary property throughout the State at far below its true value while utility and railroad properties, in marked contrast thereto, have been assessed at full value. To this contention the Court makes two answers: First, that the evidence was insufficient to overcome the presumption that the Board had equalized assessments in accordance with the State law and that the Supreme Court could not sit as a board of tax review. The second answer given to the contention was that the law of the State, by long-continued practice sanctioned by the State courts, has developed classifications for property subject to taxation and that these classifications are constitutionally permissible. In particular it is emphasized that the petitioner made no claim that its property was singled out from among other public service corporations for discrimination.

Finally, the Court considers and rejects the contention that the assessment so far exceeds the full cash value as to offend the due process clause of the Fourteenth Amendment. *Great Northern Ry. Co. v. Weeks,* 297 U. S. 135, is cited as the only case in which a nondiscriminatory assessment was struck down because the assessment was thought to be excessive. While that case is not expressly overruled, it is limited to its own peculiar facts.

The case was argued by Messrs. Wm. H. Swiggart and Edwin F. Hunt for the petitioner, and by Mr. W. F. Barry, Jr. for the respondents.

State Taxation—Federal Procedure—Jurisdiction of Three Judge Courts

Ex parte Bransford, 84 Adv. Op. 843, 60 Sup. Ct. Rep. 947. (No. — Orig., decided May 20, 1940.)

The tax collector of Pima County, Arizona, made in the Supreme Court an original motion for leave to file a petition for a writ of mandamus to compel the United States District Judge in Arizona to permit a case pending in the District Court to which he was a party defendant to be heard before three judges under § 266 of the Judicial Code because the district court proceeding sought to enjoin a state officer from enforcing a state statute upon the grounds of its unconstitutionality. The suit was one by a national bank for an interlocutory and permanent injunction against the collection of state taxes on bank shares under an assessment by the local authorities.

The Court's opinion by MR. JUSTICE REED concludes that the controversy is not one in which a three judge court must act under § 266 of the Judicial Code and therefore denies the motion.

It had been urged that the assessments were void because unauthorized by the Arizona statute. As to this, the opinion states that the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as tested by the federal constitution. It had been urged that the assessments should be enjoined because violative of the statute exempting preferred stock of the R.F.C. and R. S., § 5219, which

limits the rate of taxation of national bank shares to that assessed on other moneyed capital in the hands of individual citizens competing with national banks. As to this, the opinion concludes no constitutional provision is involved in the allegations.

It had been urged that the assessments were confiscatory and discriminatory in valuation of the common shares on comparison with the stock of other banks and property. As to this the opinion concludes that the validity of a statute is not involved, but rather the wrong doing of the assessing officers under the statute.

It was urged that a part of the state statute itself required the excessive and discriminatory assessments because compliance with it results in them and that the attack on the assessment is therefore in effect an attack on the constitutionality of the statute. As to this, the opinion points out that it is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional, which does not require three judges, since the attack there is aimed at erroneous administrative action.

The opinion concludes by observing that until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three judge court any more than if the complaint did not seek an interlocutory injunction and that even when constitutionality of the state enactment is attacked, § 266 is inapplicable unless the action complained of is directly attributable to the state statute, since the purpose of § 266 was not that every attack on the constitutionality of a statute be determined by a three judge court, but rather that precipitate determinations on constitutionality on motions for interlocutory injunctions be avoided.

The case was argued on April 23rd by Mr. Gerald Jones for petitioner and by Mr. J. L. Gust for respondent.

Bankruptcy—Agricultural Compositions and Extensions—Procedure for Foreclosure of Liens on Debtors Property

Borchard v. California Bank, 84 Adv. Op. 867, 60 Sup. Ct. Rep. 957. (No. 752, decided May 20, 1940.)

Certiorari had been granted here to determine whether the bankruptcy court may permit the foreclosure of mortgage liens upon the property of farmer debtors in proceedings under § 75 (s) of the Bankruptcy Act as amended when the procedure prescribed by that section has not been followed.

The Court's opinion by MR. JUSTICE ROBERTS concludes that the action of the district court in permitting the creditor to proceed to sale for enforcement of the liens at this stage of the proceeding was contrary to the provisions of § 75(s). It points out that the orderly procedure includes an application by the debtor for appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to the secured creditors and the entry of a stay that will assure him of his possession for three years from the date of the order; that as a prerequisite to an intelligent determination of the terms upon which the debtor is to remain in possession, the statute requires that the court and parties be informed of the fair value of the property; that the secured creditors rights are protected to the extent of the value of the property and the court may order the debtor to pay rent and make payments on principal and may make any other orders to protect the debtor and secured creditors that the situation requires; and that failure of the debtor to comply may eventuate in sale.

It then discusses the extent to which the procedure in the instant case departed from the proper course of conduct, pointing out that instead of prosecuting the proceeding before the conciliation commissioner as the petition requested, the creditor resorted to a procedure not contemplated by the statute; that by written stipulation it consented to retention of possession by the debtors and arranged that they should cooperate in cultivation of the farm using proceeds of crops for further cultivation and conservation, for taxes, and payments to the debtors; that for more than 31 months after petition for appraisal was filed no action was taken; that no stay order was entered fixing terms for the debtor's retention of possession.

The opinion concludes that in these circumstances the creditor cannot maintain that the procedure it followed is equivalent to that prescribed by the statute, and that the debtor was entitled to compliance with the statutory procedure.

The case was argued on April 30th by Mr. Lloyd S. Nix and Mr. William Lemke for petitioners and by Mr. Thos. W. Henderson for respondents.

State Boundaries—Prescription and Acquiescences

State of Arkansas v. State of Tennessee, 84 Adv. Op. 988, 60 Sup. Ct. Rep. 1026. (No. 9 Orig., decided June 3, 1940.)

An original suit was brought in the Supreme Court to determine the boundary between Arkansas and Tennessee and particularly to territory known as "Moss Island" and which at the time of the admission of Tennessee to the Union was on the Arkansas side of the Mississippi River but which, due to an avulsion in the course of the River in 1821 became a part of the Tennessee side of the River. The Court had referred the issues to Mr. Monte M. Lemann as Special Master who had reported findings and recommended a decree in favor of Tennessee. Arkansas had excepted to the report.

The Court's opinion by MR. CHIEF JUSTICE HUGHES sustains the Master's report in all particulars.

It was urged by Arkansas that the principle of prescription and acquiescence could not be applied in determining state boundaries. The opinion rejects this contention with authorities showing that in international law, the doctrine "has the same rational basis as prescription in municipal law—namely, the creation of stability and order."

Arkansas also had urged that the rule of the *thalweg* is of such a dominating character that it meets and overthrows the defense of prescription and acquiescence. This, the opinion concludes, is untenable, since the doctrine of the *thalweg* rests upon equitable considerations and is intended to safeguard to each state equality of access and right of navigation and it yields to the doctrine that a boundary is unaltered by an avulsion which in turn becomes inapplicable when prescription and acquiescence are established.

Arkansas also pressed a contention that prescription is unavailable on the ground that the land is still unsurveyed land of the United States and that therefore the defense of adverse possession cannot be used against Arkansas since she did not have title. As to this, the

opinion points that no claim of title of the United States is in question in the controversy.

A special point had been made regarding an area adjoining "Moss Island" and known as "Blue Grass Towhead," which had been formed by gradual processes of the river long after the avulsion of 1821. As to this, the opinion concludes that since Moss Island must be deemed part of Tennessee, this addition to it by gradual process must be treated as part of the Island and thus subject to the same jurisdiction.

The case was argued on April 23rd by Mr. D. Fred Taylor, Jr. for complainant and by Mr. Nat Tipton and Mr. C. M. Buck for defendant.

Due Process of Law—Validity of State Oil Proration Orders—Power of Federal Courts to Review State Administrative Action

Railroad Commission of Texas v. Rowan, 84 Adv. Op. 983, 60 Sup. Ct. Rep. 1021. [No. 681, decided June 3, 1940.]

Certiorari was granted here to determine the validity under the due process clause of the 14th Amendment of an oil proration order of the Texas Railroad Commission which limited each well to 2.32% of its hourly productive capacity under unrestricted flow, but excepted from this requirement so called "marginal wells" which, because of their low production capacity were allowed to produce up to 20 barrels a day. It was claimed that the proration formula permitted the more leniently treated leaseholds to capture oil at a more rapid rate than was possible to the respondent in this case, because it failed to give weight to relevant factors in the measurement of oil in place and because the allowance to marginal wells absorbed so much of the total "allowable" as in effect to make the order an allocation on a flat per well basis regardless of the great variation in capacity of wells and density with which different leases have been drilled and because, since the Commission grants permission to depart from the usual spacing and drilling rules, the more densely drilled adjoining tracts may, by the marginal allowance, drain away the respondents' reserves.

The Court's opinion by MR. JUSTICE FRANKFURTER holds that enforcement of the challenged order should not have been enjoined by the district court. It discusses the problem of development and conservation of oil resources at some length and points out that the administration of the laws enacted to meet the problem are full of perplexities.

MR. JUSTICE ROBERTS delivered a dissenting opinion in which he was joined by the CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS. The dissent points out that the district court had tried the case *de novo* and had made detailed and well supported findings that the order took no account of important variables, and that the circuit court had adopted these findings. It concludes by stating that the majority opinion announced principles with respect to the review of administrative actions challenged under the due process clause directly contrary to those which have been established in other cases.

The case was argued on April 24th and 25th by Mr. James P. Hart for petitioners and by Mr. Dan Moody for respondent.

Limitations of Actions—State Statutes of Limitations Cannot Bar Claims of the United States

United States v. Summerlin, 84 Adv. Op. 963, 60 Sup. Ct. Rep. 1019. (No. 715, decided May 27, 1940.)

Certiorari to determine whether a judgment of the Florida State courts holding that, under a state statute which provided that "No claim . . . shall be valid or binding upon an estate . . . unless . . . filed in the office of the county judge granting letters" and that "And such claim . . . not so filed within eight months from the time of the first publication of the notice to creditors shall be void even though the personal representative has recognized the same," a claim acquired by the Federal Housing Administration through operations under the National Housing act, and filed by the United States in the office of the proper county judge after expiration of the eight month period prescribed by the state statute, was barred and "disallowed as a claim against the estate."

The Court's opinion by MR. CHIEF JUSTICE HUGHES concludes that the statute cannot deprive the United States of the right to enforce its claim and that the United States still has its right of action against the administrator, even though the probate court be regarded as having no jurisdiction to receive a claim after the expiration of the specified period. It finds that a claim of the Federal Housing Administration acquired under the Housing act is a claim of the United States, and that, as such, the right to recover upon it cannot be barred either in state or federal courts by statutes of limitations or laches.

The case was argued by Mr. Frederick Bernays Weiner for petitioner and by Mr. Asbury Summerlin for respondent.

Due Process—Criminal Procedure—Use of Confessions Obtained by Coercion

White v. Texas, 84 Adv. Op. 946, 60 Sup. Ct. Rep. 1032 [No. 87, decided May 27, 1940.]

This case involved the validity, under the due process clause of the 14th Amendment, of a conviction and sentence of death for rape by a state court where the state had used a confession said to have been obtained by coercion and intimidation. The petition for certiorari had first been denied, but, following the decision of *Chambers v. Florida*, and on petition for rehearing raising the question of due process, certiorari was granted, and the state court judgment reversed. Rehearing of the judgment of reversal was sought by the state and the opinion here is on that petition for rehearing.

MR. JUSTICE BLACK delivered the opinion of the court. He first examines the state's contention that since the accused at the trial denied having made or signed the confession, he cannot urge that its use by the prosecution denied him of due process. As to this the opinion points out that the state insisted and offered evidence to prove that the confession was signed, and that since the confession was submitted to the jury to obtain conviction, the question of due process in the way it was obtained and its use must be determined. The opinion then reviews in some detail the activities of the police from the time of the arrest until the confession was obtained, and concludes that "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

The case was argued on petition for rehearing filed by State of Texas by Mr. F. S. K. Whittaker for petitioner and by Mr. Lloyd W. Davidson and Mr. William J. Fanning for respondent.

JUNIOR BAR NOTES

BY JOSEPH HARRISON
Secretary of the Junior Bar Conference

Plans for Annual Meeting

MR. JOSEPH D. CALHOUN, of Media, Pa., Chairman of the Program Committee of the Junior Bar Conference, at the Philadelphia meeting, advises that plans for the Conference have been virtually completed. The program arranged is as follows:

Sunday, Sept. 8.—Luncheon at the University Club for all members of the Conference, their wives and friends.

2:00 P. M.—Opening session of the Conference, principal speaker to be announced.

5.00 P. M.—Reception to members of the Conference, their wives and friends, at the Philadelphia Country Club tendered by the younger members of the Philadelphia Bar Association.

Monday, Sept. 9.—Breakfast to the State Chairmen of the Junior Bar Conference with the Officers and Members of the Council as hosts.

Tuesday morning, Sept. 10.—Concluding general session of the Conference. Solicitor General Francis Biddle will deliver the principal address.

Tuesday evening, Sept. 10.—Annual Dinner-Dance of the Junior Bar Conference. There is a possibility that this affair will take place aboard a spacious boat which will take the party on a cruise in the Philadelphia harbor.

Cooperating with Mr. Calhoun's committee is the Philadelphia Committee on Arrangements which includes Samuel Fessenden, Chairman; Thomas E. Frame, Jr., Vice-Chairman; C. Clothier Jones, Robert F. Lehman, Joseph Pennington Straus, and Lewis H. Van Duesen. The annual meeting of the Junior Bar Conference has become an important event for the younger lawyers of the country.

Dates for Annual Reports

With the most effective working months behind them, the Junior Bar Conference officers are now concerned with the preparation of an account of the activities for the year 1939-40. The following schedule for filing reports by members of the official family of the conference has been arranged:

Reporting Group	*Date Report Is Due*
State Membership Chairmen	July 1
State and local directors of public Information	July 1
State Chairmen	July 8
Chairmen of Committees	July 22
Council Members	July 22
Public Information Director	July 22
Conference Chairman	Aug. 1

It is most important that each of the reporting groups faithfully adhere to the foregoing schedule. This will enable officers all along the line to prepare their reports before the advance program printing-deadline.

The Boston Regional Meeting

One of the finest and best attended regional Conference meetings was held at Boston on Saturday, May 25th. More than two hundred members from the First and Second Circuits participated in this event which included morning and afternoon sessions and a luncheon at the Parker House. Mr. Robert R. Thurber, Boston, State Chairman for Massachusetts made the welcoming remarks at the morning session. "Trial of a Case in Court" was the topic of a symposium to which the entire morning session was devoted. At the luncheon, over which Mr. Thurber presided, messages of welcome were given by Mr. Nathaniel J. Lyne, Vice-President of the Boston Bar Association, and by Assistant Corporation Counsel Robert Hopkins for the City of Boston. Senior Federal Circuit Judge Calvert Magruder spoke informally. The principal address at the luncheon-meeting was given by Justice Stanley E. Qua of the Supreme Judicial Court of Massachusetts. Highlight of the afternoon session was the address given by Hon. Grenville Clark, of New York, Chairman of the Bill of Rights Committee of the American Bar Association, who spoke on "Free Institutions and the War." Cooperating in the preparations for the meeting were the following members of the Conference, all of Boston: Charles F. Goodale, George Bancroft, Frank L. Wiegand, Jr., Richard S. Shuman, A. H. Parker, F. H. Russell, H. J. Cohen and G. H. Bleicken.

Tangible Results in North Carolina

A bright spot in Conference activity this year is the progress made in the conduct of the Public Information Program in North Carolina. Henry Bane of Durham, N. C., who has served the Conference in many important capacities, this year accepted the responsibility of acting as North Carolina State Director for the Program. Early this year, Mr. Bane called a meeting of keymen who met at Greensboro to organize their efforts in carrying out the Public Information Program. In the months following this meeting many addresses over the radio and before civic groups were given on subjects outlined in the Program's handbook. Most of the activity was in Durham, Raleigh, Winston-Salem, Greensboro and Wilmington. In several instances this work was carried on in cooperation with local junior bar groups. In Raleigh the Junior Chamber of Commerce carried on a ten day Americanism program which included ten radio addresses given by younger lawyers who used material supplied by the Public Information Program. The limitations of space do not permit a more detailed account of the good work done in each of these municipalities.

The Judicial Survey

Paul F. Hannah, Chairman of the Junior Bar Conference, met with the National Conference of Judicial Councils in Washington last week and presented a detailed report on the progress of the Survey of the Administration of Justice. The report indicated that Directors were working in all but three states, and that to date a total of twenty reports had been received. Mr. Hannah distributed copies of the forms used in the Survey, and a lively discussion centered around them. The Conference was the luncheon guest

of the Honorable Henry P. Chandler, Director of the Administrative Office of the United States Courts. Mr. Hannah and Paul DeWitt, the Director of the Survey, also met with the Council of the Section of Judicial Administration and plans were made for a continuation of the Survey and a report on it at the annual meeting of the Association in September.

The Survey in Arkansas

A further indication of the practical results that the Junior Bar Survey has achieved comes from Frank Pace, Jr., State Director of the Survey for Arkansas. Mr. Pace has reported that as Chairman of the Committee on Law and Law Reform for the Bar Association of Arkansas he has incorporated a recommendation in the report of that committee to the Bar Association, of the pre-trial procedures advocated by the Section and urged its adoption by the legislature. These recommendations were read at the meeting of the Association and were unanimously adopted. Mr. Pace reports: "Thus one step has been taken toward the introduction of these advantageous procedural reforms in the state of Arkansas."

Chicago Plans for Summer

The Committee on Activities of Younger Members of the Chicago Bar Association plans to organize study groups to meet and discuss practical legal problems during the months of July and August. The committee recently sent a questionnaire to the younger members of that Association requesting them to indicate their interest in the plan and their choice of topics for discussion. If sufficient interest is shown, seminars for groups of younger lawyers would be arranged for, and periodic luncheon meetings held at the spacious quarters of the Chicago Bar Association. The letter accompanying the questionnaire states: "The plan has been tried experimentally by the Committee on Activities of Younger Members which reports favorable results and recommends an extension of it."

Colorado Conference Progress

At the request of State Chairman Hugh D. Henry of the Colorado Junior Bar Conference, meetings of the state committees were held on May 26th at Denver. Following these meetings, the members and their wives and other accompanying ladies dined together at the Albany Hotel. After the dinner, the members convened in a general session to discuss the committee reports. These showed that substantial progress was being made in the several aspects of the Conference program. State Membership Chairman Harold Taft King announced that forty-six new members had been enrolled this year up to the date of the meeting. Since Colorado's quota for the year was twenty members, this state has exceeded its assignment by more than one hundred per cent. With Harlan Howlett as Chairman, the Economic Survey Committee shortly plans to send an appropriate questionnaire to every member of the Colorado bar. Chairman Mark Harrington, of the Placements Committee, reported that "several young attorneys have been placed in positions as a result of the work of the committee."

The Colorado Junior Bar Conference has held four regional meetings this year in addition to the general meeting on May 26th. Another regional meeting will be held in Denver on June 22nd. The annual meeting will be held at Colorado Springs on September 29th.

"Loan Shark" Study

The Junior Bar Conference's Committee in Aid of the Small Litigant was requested at the last annual meeting "to supervise and direct such surveys on . . . personal finance conditions as the officers and Council of the Conference shall authorize." The "loan shark" evil as it has affected large numbers of persons in the low income group in certain parts of the country was a particular object of interest to the Conference officers and council and to this committee. Former Conference Chairman Ronald J. Foulis, St. Louis, Mo., Chairman of the committee, designated George L. Gisler, Kansas City, Mo., to act as a sub-committee on the particular assignment dealing with the problem of "loan sharks" and their victims. A tangible contribution toward the furtherance of this objective was made in the form of a "Manual for the Use of Small Loans Committees of Local Bar Associations." It serves as a complete guide to those local groups who ultimately become sufficiently aroused at the depredations of "loan sharks" to want to do something to curb them. In an eight-page appendix the manual presents case-histories which expose the devious methods of irresponsible small loan companies as learned through the experiences of local bar groups who have successfully opposed the "loan sharks."

Rule-Making Power in Criminal Cases

On June 22 Congress passed and sent to the President an important bill. It extends the Supreme Court's rule-making power in criminal cases. In its report [of June 21] approving the bill the Committee on the Judiciary, of the Senate said, in part:

"The entire field of Federal judicial procedure is within the rule-making power of the Supreme Court, except such part of the criminal procedure as relates to all proceedings prior to the completion of the trial or the entry of plea of guilty. As a result it has been possible to develop a simple, uniform system of pleading and practice in the Federal courts in all matters except those last mentioned.

Federal criminal procedure prior to verdict or plea of guilty . . . in effect requires conformity to the common law as modified and changed by the constitution and statutes of the State in which the Federal court is held. Actually there is no true conformity with State procedure, because there are certain points of procedure, that are regulated by Federal statutes. Lawyers accustomed to practicing in the State courts, on going into a Federal court to try a criminal case, cannot depend on the conformity principle. They have to ascertain on what points conformity is the guide and on what points some Federal statute is to govern.

Under these circumstances there is considerable confusion and lack of uniformity in respect to the matter. So long as it remains necessary to search the common law, the statutes, and constitutional provisions of the States, before the proper procedure can be agreed upon, just so long will our procedure remain confused and complex. The committee is of the opinion that the enactment of this legislation will promote uniformity, and eliminate technicalities and delays in criminal cases.

This legislation has been vigorously urged by the Attorney General."

AMERICAN BAR ASSOCIATION JOVRNAL

LAWYERS AND THEIR HOME COMMUNITIES

The past month has been a testing time for the spirit and the soul of democratic America. The catastrophes which have befallen free governments abroad, through the sweep of armed terror and mechanized force, have brought an imminent sense of anxiety and deep concern to people in all parts of the country. These have truly been the most tragic and trying days of the Christian era.

Under such circumstances, the democratic spirit of America has significantly begun to reassert itself in more vigorous tones, throughout the land. In countless communities, the people have come together in meetings locally constituted, for the purpose of exchanging views, taking counsel together as to what can practicably be done for the fulfillment of local responsibilities, and gaining a sense of strength and unity through a neighborly discussion of the common tasks. Not in many years, if ever, has there been such a spontaneous revival of the "town meeting" idea which had its roots in early America and then fortified the spirits of men and women beset with grave perils.

This manifestation has been in itself reassuring. One of its characteristic features has been that, as always in times of National emergency, American lawyers have come naturally into places of leadership and responsibility in the communities aroused by the far-flung challenge to liberty and justice under law—the threatened destruction of the traditions and the way of life which stem from Magna Carta and the Bill of Rights. In the re-awakening of the spirit of the "town meetings" of old days, all considerations of partisanship and religious, racial or social differentiations are happily laid aside; and the trusted lawyers of the communities are natural servants and spokesmen of the common purpose. The people turn instinctively to them to indicate and formulate the practicable and sensible things to do, in aligning public opinion in broad and full support of those who at this time have the Nation's future in their official keeping. The counsel and the objective of the lawyers in their home communities are for an aroused and reunited American spirit of preparedness for all eventualities.

Such a demonstration anew may mean more for the future of the profession than any planned projects of our own could mean. The American lawyer in his home town commands especial respect in crises, for he is a vital part of the maintenance and defense of our representative form of government.

PHILADELPHIA MEETING

The annual meeting of the American Bar Association in Philadelphia, September 9-14, is mentioned in several places in this issue. Due consideration of this event requires that its importance in the lives of American lawyers be stressed. In the long period since 1877, when the first meeting was held in Saratoga Springs, there never has been a meeting held at a more portending time. In the heavy contest that is bound to occur in the days and the years to come a contest to defend and maintain democratic institutions against foreign economic and social ideologies—the lawyers of our country will be called upon to bear a leading part. These things may not be a formal part of the program at Philadelphia, but they will be in everybody's mind, and on every lawyer's tongue. For this reason alone, it would seem that there is a Macedonian call for every lawyer in America, who can, to attend the Philadelphia meeting.

DEMOCRACY IN ACTION

Now that the existing Democratic forms of Government have been stricken down (temporarily it is hoped) in 12 nations of Europe, the approaching presidential election in this country takes on an historic significance. Here, where the Democratic System of Government was born a century and a half ago, it still flourishes with undiminished vigor; it is entirely undismayed by recent events abroad. The campaign managers of the two great parties are hereby reminded of these facts. The coming campaign, in its methods and its technique, should be an object-lesson to the world of Democracy in action.

LAWYERS AND THE ART OF LIVING

The Managing Editor was pondering over the materials for his first editorial, a few days ago, when suddenly an interesting and stimulating visitor came into the editorial sanctum. It was the Honorable Mr. Sidereal,* Juris-consult, and President of the Bar of the Planet Mars, who had come to earth for a friendly visit with the profession here. He greeted the editor cordially and openly, but said (with a slightly cynical smile) that he preferred to appear in the law courts and in law offices in what he called his *astral* body. He revealed to the Editor many interesting comments about our profession. Many of them cut almost to the quick of professional self-esteem.

One criticism of the profession by this distinguished Brother-from-afar seems most apt and timely. When asked for the outstanding impression made on him by our mundane profession, he replied—

> "Well, to me it's very surprising. But you lawyers on earth are nearly all alike in one respect. You are good lawyers generally, sometimes very good. But you are totally engrossed in your practice, and in materialistic ends. You make your Profession an *End* in itself, instead of a *Means* to an End. You have little or no knowledge of the art of living."

He went on to say that lawyers really should be experts in that art, but few of them were. He referred to Demosthenes and Cicero as great lawyers, and yet each of them had lived a full, rich life, and had become famous outside of his profession. He spoke highly of the philosophic and professional outlook of the English and French lawyers. They, he said, do not surrender every spark of vitality, every other joy of life, to their practice. He referred to the late Justice Oliver Wendell Holmes as a brilliant exponent of the Art of Living. Our visitor concluded the interview by saying that he found the average American lawyer highly competent in his work, but ceaselessly wrapped up with his leather-bound books and his voluminous files and papers. Of course, he said, there were sparkling and stimulating exceptions.

This indictment of his Brothers-in-the-Law set your Editor to thinking. He mentally called the roll of some of his own lawyer friends, and his classmates of thirty years ago. Most of them have achieved fair success, along professional lines; some of them very much so. But are they, in any true sense, experts in the Art of Living?

There is Tom —. He is now really big lawyer in Chicago. He has a fine family of growing children. But he spends little time at home because of the press of business at the office. Does he really enjoy and appreciate the richness and inspiration of his children's youth and play? There is Jack —. in New York City. He is also growing rich and stodgy from his practice. He has a wife who drives him on ceaselessly with her social aspirations. What other domains of life are now open to him (and to Tom) now that they have achieved success? What about their life-expectancy, now that they do not have to work any longer?

And then there is Sam —, in Washington. He, too, has reached the top. He is a bachelor. He has never known the joy of watching babies grow up. Young people, and their vagaries and flippancies, irritate and annoy him. He plays golf and feels that the game is his great resource and compensation. But what about his time? Try as he may, he has five or six hours of leisure time every twenty-four hours, and nothing to do with them. Life sometimes gets very lonely for him. If only he knew how to use that leisure time in a way that would bring in some spiritual reward.

Every lawyer (and every layman) can call the census of his professional brethren in much the same way. How many of them, on reaching middle-life, can look forward, and say with Stevenson:

> "Oh, thou my Love, oh, ye my Friends!
> The Gist of Life, the End of Ends!
> To laugh, to love, to live, to die!
> Ye call me with the ear and eye."

The late Joseph H. Choate, one of the greatest of American lawyers, called attention to these things more than sixty years ago. He ended his address with this warning:

> "While I am on the subject (of constant study by the lawyer) let me urge every one of you, however much he may study the law, to study something else. Ours is not only a learned but a liberal profession; and no more stupid notion ever prevailed than that a good lawyer is hurt by the culture in some other direction. The daily practice of the lawyer without some liberal culture, narrows and benumbs the faculties and unfits them for anything outside the furrowed rut of practice. I know of few spectacles so pitiable as that of a successful lawyer, past middle life, satiated with the gains and even perhaps the honors of a generous practice, who finds himself tired already of his profession, and yet unable to do anything else or enjoy anything else. And so I say, add some other subject or study to your legal studies, and don't let go of it when you get into busy life. Every lawyer should have a hobby-for-his-mind to ride in the open air of knowledge, and ride it every day—history, science, politics, language, literature—anything rather than law alone. So only, can you be wholly true to the dreams of your youth, and carry their freshness with you into mature years."

These words of Choate are a fitting conclusion to our visit with Juris-consult Sidereal, that famous lawyer from Mars.

*See Webster's Dictionary.

PRE-TRIAL PROCEDURE—SOME PRACTICAL CONSIDERATIONS

By Hon. Alfred P. Murrah
United States District Judge, State of Oklahoma

FUNDAMENTALLY, the principle of pre-trial procedure is neither new nor novel to the experienced trial judge. The only thing essentially new is the rule which vitalizes the practice and provides a modern vehicle for its utilization, where indicated by the volume of business, or class of cases.

As one inexperienced in the administration of justice, the adoption of the rule offered to me, as a trial judge, another field for trial and error, which is primarily the basis upon which I have proceeded to act, in a judicial capacity for a little more than three years past. It is, therefore, quite easy to apprehend my enthusiasm with respect to it and my inclination to explore all of its potentialities. Because pre-trial procedure is old in substance and new in form and because of my verdant curiosity, I deem it not inappropriate for me to say something regarding my observations and experiences with relation to its application in my court. My purpose is not to counsel, advise or instruct but to review my brief experience with the hope that something may be derived from it by my colleagues, which may be added to their wealth of experience in the discharge of their duties.

The principle of pre-trial procedure had its origin in English Jurisprudence and particularly in the English trial courts, wherein the rule providing for pre-trial conferences has been amended from time to time to give expression to the need for the same in the light of experience.

In England it finds expression in the rule known as "Summons for directions," which provided for summons to counsel, immediately after filing of a suit and before the issues were cast. Counsel were called before a master, whereat the issues were simplified. Counsel for plaintiff was called upon to state the nature of his case and the proof relied upon to sustain it. Later the rule was amended so that at present the proceeding is conducted before the Judge, either in chambers or in open court.

My attention was first called to the English form of pre-trial procedure by our late Judge McDermett in 1936 soon after Judge McDermett returned from England. We had the honor to have him as our guest speaker at our annual bar banquet in Oklahoma City. The subject of his able address was English courts and procedure. It was clear that he was most favorably impressed by the pre-trial calendar and the results accomplished. At that time Judge McDermett strongly urged the adoption and use of a similar rule in American trial courts. He expressed the hope that American courts would provide a rule for pre-trial conference, whereat the issues of a pending law suit could be discussed freely and informally, with the mutual desire and purpose on the part of both counsel and the court to simplify the issues by stripping the pleadings of all their literary niceties and arriving at the true issues of the controversy.

It may be said to be a short cut to the simple truth, which also lends itself to the proper administration of justice. Its primary purpose is to eliminate technical defenses which tend to impede and obstruct the administration of justice, by unnecessary delay; to shorten the trial of cases by encouraging counsel to agree upon facts not materially in dispute, and which might otherwise require time and expense in their production. Pre-trial procedure, in somewhat the same form, had its origin in America in a number of the large Metropolitan centers, where the court dockets were so crowded that cases could not be reached for trial until after most of them had become moot, because of the lapse of time between filing of the same and their adjudication. In these centers there were a number of judges sitting in the same jurisdiction. In these instances a pre-trial docket, or pre-trial calendar, was instituted and one judge assigned to that docket. The cases were called and it was found upon an informal discussion of the issues that approximately one-third of them could be settled by the willingness of the counsel to cooperate with the Court, in his impartial and helpful suggestions concerning the issues. Statistics have proven the value of such procedure in these centers. It may be said that the success of the experiences in the Metropolitan centers prompted the framers of our new Federal Rules of Civil Procedure, in recommending this rule. The rule itself is flexible and broad in its scope. It permits the judge to conduct the pre-trial conference, contemplated by the rule, in any manner he sees fit or finds most advantageous. In that connection it seems to be well settled that the utility of the rule, its advantages, and the manner of its application is governed, to a large extent, by the peculiar condition found to exist in the respective jurisdictions. Its value to the trial judge, in its strictest sense, is governed by his docket. Judge Chesnut described it as "procedure which adds to the flexibility of the administration of justice, to economy, to certainty, and to dispatch."

In the past it has been a common practice among trial judges, before the adoption of this rule, to call lawyers into their chambers for informal conference, concerning the issues in a complicated law suit, for the purpose of reaching an agreement concerning many items of evidence and proof, and for the purpose of encouraging compromise and settlement. I know that my learned colleague, in the Western District of Oklahoma, followed this procedure with great success before I became connected with the Federal Judiciary and long before the adoption of this rule.

The Bank Case

In accordance with the flexible purposes of the rule most every judge has a different conception of its application and a different method for achieving its purpose. As an example, my colleague, Judge Vaught, prefers to conduct his pre-trial conferences in his chambers in an informal way, without benefit of a reporter. While I have found it more successful to

FEDERAL JUDGES DISCUSS COURT BUSINESS

Federal Circuit District Court judges for the Tenth Circuit, met in Denver in early June, to discuss the business of the courts, problems of procedure and matters of administration. Eleven federal judges were in attendance. Meeting with them were Henry P. Chandler, director of the United States Courts Administrative Office, and Will Shafroth, Chief of the Division of Procedural Studies of the Administrative Office. Left to right: District Judges Edgar S. Vaught, T. Blake Kennedy and J. Foster Symes, Circuit Judges Walter Huxman, Sam G. Bratton, Robert E. Lewis (retired), Orie L. Phillips, Mr. Chandler, District Judge Colin Neblett, Circuit Judge R. L. Williams (retired), District Judges Alfred P. Murrah and Eugene Rice and Mr. Shafroth.

conduct my pre-trial conferences in the court room, where a stenographer reports the proceedings; at the conclusion of which, a charge is made and assessed as a part of the costs. By this method, either party interested may secure a transcript of the same in order that there may not be any misunderstanding concerning the agreement. This also eliminates the necessity of counsel drafting a stipulation to cover the proceedings. In my opinion, each of the methods is successful and meets with the hearty approval of the Bar. We have elected to conduct our pre-trial conferences, each using a different method, in order that we might determine what the most advantageous procedure would be. I believe my colleague will agree that either method has proven to be of invaluable assistance to us in disposing of a crowded docket in the Western District of Oklahoma.

As an example of the procedure employed in my court: Since September, 1939, 189 cases have been before me on pre-trial conference in the Western District of Oklahoma, alone. Usually these cases are heard pursuant to a regular assignment. 50 or 60 cases are set for one week, which week is set apart exclusively for pre-trial hearings. From 6 to 10 cases per day are set, equally divided between the forenoon and afternoon. This avoids the necessity of having lawyers wait in the court room until their case is called. When the case is called on pre-trial conference the attorney for the plaintiff is called upon to state the facts briefly. He is not permitted to read his petition but is asked to merely state briefly and succinctly the substance of his complaint; the Court determines in a general way what may be fairly admitted without prejudice to the defendant. Defendant is then asked if he will agree to certain items of proof essential, yet usually preliminary to the cause. The defendant states his contentions and is given an opportunity to inquire of plaintiff concerning certain items on which there is apparently no dispute, or which relates to documentary evidence or matters which can be ascertained by reference to records and other reliable sources. After the Court has secured all the admissions, clarified all the issues, then many times the Court and counsel find there remains in the law suit only a narrow issue. At this stage of the proceedings the Court many times does his most effective work. He may say to counsel that it appears to the Court that this law suit could be settled without much difficulty. According to the records in the Clerk's office in the Western District of Oklahoma, out of the 189 cases heard on pre-trial conference since Sept. 1939 in my court alone, approximately one-third have either been settled or have been so simplified that only a few hours were required for the argument of the question of law presented by the agreed facts. Also, prior to the pre-trial conference many attorneys have neglected to request a jury trial, as required by the rule. Many have asked for jury trial and in pre-trial conference found a jury was not required in the disposition of the case. This permits the Court to determine what cases should be placed on the jury docket and what cases are to be set on the non-jury docket. It should be added here that either at the time, or prior to the setting of the pre-trial dockets, it is determined that on a given date the court will set a trial docket so that at the conclusion of the pre-trial conferences the attorneys are asked if a certain date for the trial of their case will be satisfactory. The length of time required for the trial of the case is estimated and by that method the court

makes up his trial docket, giving consideration to the time required to try the case in determining the number of cases to be set in one day or whether it will take more than one day in which to try the case. Again we save the loss of time by avoiding the necessity of having lawyers, clients and witnesses waiting in the court room two or three days while we are reaching their case.

Makes for Stabilization

During the fall and spring term of court, in the Western District, cases which have been set on pre-trial dockets, are tried and decided. I can recall but one or two instances where lawyers have been compelled to wait more than one-half a day after their case is called on the docket, before the trial of the same is reached. We have followed the practice of setting a non-jury docket to follow the jury docket so that in the event it develops after cases have been set from the pre-trial docket to the trial docket, that jury trial is not needed, or required, the case is then transferred to the non-jury docket. The facts usually are stipulated to and the cases reset at a convenient date on the non-jury docket. A summary judgment docket is also set, where cases are heard and disposed of under the rules.

A noteworthy example and a case, which in my opinion illustrates quite clearly the advantages to be gained in a pre-trial conference was set on one of my pre-trial assignments. Plaintiff was a trucking contractor, operating a fleet of trucks in the oil fields. He had been purchasing his tires from the defendant company. He sued the company on their warranty, alleging the tires had not given service provided by the warranty. There were 277 tires on which a breach of warranty had been alleged and an adjustment claimed. When the case came on for pre-trial conference it was soon made to appear that it would be necessary for the Court to examine the 277 tires or to hear expert testimony on each side concerning the per cent service rendered and the consideration of the deficiency in the service. It was decided, by agreement, that each side would suggest three expert tire men. The court would summon them into court, examine those summoned, touching their qualifications, their interest, their connections and affiliations, with the view of selecting an impartial arbitrator. The parties were summoned, examined by the Court and instructed with respect to their duties, after which the Court selected one of the parties. The arbitrator traveled 65 miles, to the place where the tires were stored, examined each one of the tires, in question; made a detailed report concerning the per cent service rendered and the cause of such deficiency. When the report was rendered it was determined that instead of plaintiff having a claim in excess of $5,000, as alleged in his petition, he was only entitled to about $300.00. The case was set for trial, by agreement, on the non-jury docket.

Plaintiff's counsel came into my chambers the day before the case was set for trial with a sheepish grin on his face, told me of his desire to dismiss the case, without prejudice. I was surprised because I had selected one of those suggested by plaintiff, as the arbitrator. He was reluctant to state his reason, but I was soon convinced that the report of the arbitrator had settled his law suit. I informed him that I would not dismiss the case and the case would be called for trial. With fairness to his client, he let me know he was perfectly satisfied to submit the case and the report was entirely fair and equitable. When the case came on for trial the arbitrator was placed on the witness stand, gave a detailed report and adjustment on each of the 277 tires. Judgment was rendered in accordance with the arbitrator's report. The case was tried and decided in about two hours. If the court had listened to expert testimony on either side and had each expert witness testified as to each of the 277 tires, it probably would have required two or three days to have tried the case and from that maze of conflicting testimony the court would in some way have arrived at a judgment.

It is clear that much time and delay is saved by pre-trial conferences. The friendly and enthusiastic co-operation of the Bar has made it possible for us to more efficiently expedite the administration of justice in our courts and it should be said that without the hearty co-operation of the Bar of the Western District of Oklahoma, the Court could not have accomplished nearly so much. We have been particularly impressed by the spirit shown by the Bar in their effort to work with us. Many of them do not know the exact purposes to be accomplished by the pre-trial conference. Some of them at first, are reluctant to show their hand, so to speak, but when assured by the Court that their interest will be protected, and they need have no fear that their client's interest will be prejudiced by the disclosure of any facts, they are always ready and willing to follow the court's suggestions in arriving at the true facts, even many times at the expense of admitting facts which are determinative of the controversy.

Pre-trial conference before the pleading are cast, as in England, is recommended. It will take us some time to educate ourselves and the bar that statements of the simple facts and all the facts in pleading a cause is the only essential and desirable means of arriving at the justice of the cause.

"Narrow Legalism" Scored

Recent "liberal" opinions of the Supreme Court, which have been the source of much debate in the legal profession, are in no small part responsible for the ability of the nation to meet its national defense needs, Attorney General Robert H. Jackson told the University of Virginia's Institute of Public Affairs last June. The Institute this year was devoted to national defense. The Attorney General took the opportunity to give his views on the development of government, the Supreme Court and federal law in relation to the protection of the country as well as throw out a suggestion that the courts would do well to put on a little more speed.

Jackson said he foresaw greater economic planning under a government bigger than any of the governed, due to Supreme Court decisions freeing the federal authority "of unwarranted limitations which gave an unwholesome dominance to vested private interests as against the public welfare."

Most important Supreme Court decision has been that in which the unemployment compensation system was upheld, Jackson told his audience, inasmuch as this has replaced the old doctrine of dual federalism with the doctrine of co-operative federalism. As a consequence of this decision, the Attorney General declared, the government today has the "greatest power in the history of the country to co-operate."

[*American Law and Lawyers, June,* 1940]

PROGRAM FOR THE SEPTEMBER MEETING

SECTION OF COMMERCIAL LAW

Jacob M. Lashly, Chairman, Presiding

Tuesday, September 10

9:30 A. M.

FIRST SESSION

Approval of minutes of last meeting

Résumé of accomplishments and business of the current year

Report of Mid-winter Meeting of the Council

Address by the Chairman

Appointment of Nominating Committee

"Liquidations and Bankruptcy," presentation by Paul H. King, Chairman, and members of the Committee

Open discussion

12:30 P. M.

LUNCHEON

JOINTLY WITH MUNICIPAL LAW SECTION

Messrs. Lashly and Chandler, Presiding

Honorable Fiorello H. LaGuardia, Mayor of New York City, guest speaker

2:00 P. M.

SECOND SESSION

"Reorganizations," under leadership of John Gerdes, Chairman, and members of the Committee

Review and discussion of pending legislation on reorganization of railroads

Open discussion

Report of Nominating Committee

Election of Officers and Members of the Council

SECTION OF CRIMINAL LAW

James J. Robinson, Chairman, Presiding

Monday, September 9

2:00 P. M.

FIRST SESSION

Report of Chairman

Report of Secretary

General Subject: "The Fifth Column as a Criminal Law Problem." Principal speaker (to be announced later) and discussion leaders

Reports of Committees:

Coordination of Law Enforcement Agencies, Attorney General Earl Warren, San Francisco, California, Chairman

Police Training and Merit Systems, Judge Curtis Bok, Philadelphia, Pennsylvania, Chairman

Procedure, Prosecution and Defense, Judge W. McKay Skillman, Detroit, Michigan, Chairman

Tuesday, September 10

10:00 A. M.

SECOND SESSION

General Subject: "How to Deal with the Organized Racketeer under the Criminal Law." Principal speaker (to be announced later) and discussion leaders.

Reports of Committees:

Magistrates and Traffic Courts, Hon. George A. Bowman, Milwaukee, Wisconsin, Chairman

Federal Election Laws, Arthur J. Freund, St. Louis, Missouri, Chairman

Rating Standards and Statistics, Hon. Dan W. Jackson, Houston, Texas, Chairman

Sentencing, Probation, Prisons and Parole, Dean Wayne L. Morse, Eugene, Oregon, Chairman

Wednesday, September 11

2:00 P. M.

THIRD SESSION

General Subject: "Keeping Free Government at Work—the Task of the Criminal Law." Principal speaker (to be announced later) and discussion leaders.

Reports of Committees:

Education and Practice, Hon. Cornelius W. Wickersham, New York City, Chairman

Supreme Court Rules for Criminal Procedure, Hon. Arthur T. Vanderbilt, Newark, New Jersey, Chairman

Completion of unfinished business of the Section

Meeting of the Council of the Section

SECTION OF INSURANCE LAW

MONDAY, SEPTEMBER 9

2:00 P. M.

FIRST GENERAL SESSION

John W. Cronin, Chairman, Presiding

Address of welcome by Hon. Matthew H. Taggart, Insurance Commissioner of the Commonwealth of Pennsylvania

Response by Chairman, John W. Cronin

Report of Secretary, Clement F. Robinson, Portland, Maine

Appointment of nominating committee

Reports of Committees:

Membership

Aviation Insurance Law

Lay Insurance Adjusters

Conference with National Association of Insurance Commissioners

Unauthorized Insurance Companies

Fraternal Insurance Law

Address: "An Insurance Man's View of Insurance," by Benjamin Rush, Chairman of the Board, Insurance Company of North America, Philadelphia, Pennsylvania

Address: "A Banker's View of Insurance," by Frederick A. Carroll, vice-president, National Shamut Bank of Boston, Boston, Mass.

TUESDAY, SEPTEMBER 10

ROUND TABLES

First period 9:30 A. M. to 11:00 A. M.

ROUND TABLE I

AUTOMOBILE INSURANCE LAW

Royce G. Rowe, Chicago, Illinois, Presiding

"Actions Against the Company Under the Policy," by Arthur F. Bickford, Boston, Massachusetts

"Introduction of Evidence of Insurance Coverage in Personal Injury Actions," by T. Harry Rowland, Camden, New Jersey

ROUND TABLE II

LIFE INSURANCE LAW

Ralph H. Kastner, Chicago, Illinois, Presiding

"Taxation of Insurance Proceeds—What the Insured and Beneficiary Face":

(a) "Federal Estate Taxes," by Price H. Topping, New York City

(b) "State Inheritance and Estate Taxes," by Milton Elrod, Indianapolis, Indiana

(c) "Federal and State Income Taxes," by Paul Myers, Washington, D. C.

ROUND TABLE III

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE LAW

Thomas N. Bartlett, Baltimore, Maryland, Presiding

"The Rule as to Presumptions and Inferences in Compensation Cases," by Walter L. Clark, Baltimore, Maryland

"Border-Line Injuries Under Compensation Laws," by George H. Detweiler, Philadelphia, Pennsylvania

Second period 11:00 A. M. to 12:30 P. M.

ROUND TABLE IV

HEALTH AND ACCIDENT INSURANCE LAW

V. J. Skutt, Omaha, Nebraska, Presiding

"Modifications by Statute of the Law of Breach of Warranty, Concealment and Representation," by Jewel Alexander, San Francisco, California

"Traumatic Neurosis as a Disability under an Accident Policy," by Mark E. Archer, Indianapolis, Indiana

ROUND TABLE V

MARINE AND INLAND MARINE INSURANCE LAW

Robert E. Hall, Hartford, Connecticut, Presiding

"The Impact of the War upon Marine Insurance Law," by James W. Ryan, New York City

"War Risk Insurance," by Samuel D. McComb, New York City

Third Period 2:00 P. M. to 3:30 P. M.

ROUND TABLE VI

QUALIFICATION AND REGULATION OF INSURANCE COMPANIES

Edwin W. Patterson, New York City, Presiding

"State Supervision of the Insurance Business," by Hon. Ernest Palmer, Director of Insurance, State of Illinois (45 minutes)

"Proposed Act on Conflict of Laws in Relation to Insurance Contracts." Seminar on the need for, and the wording of, such a statute.

(For the text of the proposed act, see 1940 Report of Committee on Qualification and Regulation of Insurance Companies, or 1939 Report of same Committee, in Committee Reports, pp. 50-52.)

Introduction by the Chairman (10 minutes)

Life, accident and health insurance and annuity contracts in relation to the statute (15 minutes)

Fire and marine insurance (including inland marine) in relation to the statute (10 minutes)

Casualty insurance in relation to the statute (15 minutes)

Fidelity and surety contracts in relation to the statute (10 minutes)

General discussion from the floor

QUESTIONS TO BE DISCUSSED:

1. Is an act of this sort, designed to clarify and make uniform the law relating to the validity and construction of insurance contracts, needed sufficiently to justify the continuation of efforts to draft it in final form and procure its adoption in the several states as a uniform act?

2. Is the location-of-risk rule, stated in subsection one, preferable to the place-of-delivery-or-issuance rule, which, as stated in subsection two, is to be superseded by the location-of-risk rule, as between states adopting the uniform act, in dealing with the types of contracts specified in paragraphs (a) to (e) of subsection one?

3. Are there situations, arising in connection with any of the types of insurance contracts specified in paragraphs (a) to (e) of subsection one, in which some other rule than the location-of-risk rule would be more convenient and just? If so, what are these situations, and why should a different rule be preferable?

4. Is it best to apply to group insurance contracts or other multiple-risk contracts (e. g. motor vehicle fleets) covering risks located in different states, the rule of subsection two (place-of-delivery-or-issuance) or some other rule?

5. If the general principle of the act is good, are there any changes in wording which would improve it?

6. Should the whole question be left to the courts to work out in each case, subject to such statutory provisions as now apply to insurance contracts "issued" or "delivered" in the state?

(On the background of the act, see addresses before the Section of Insurance Law by Messrs. Carnahan, Patterson and Pierson, as printed in Report of Proceedings of the Insurance Section, 1937, pp. 58 to 64, and in Insurance Counsel Journal, Vol. V, No. 1 (January, 1938) pp. 22-37; also Restatement, Conflict of Laws (1934) sec. 317-319 (as to insurance contracts) and sec. 332 (general rule). The proposed Act was printed, and commented upon, in the Program and Committee Reports, Section of Insurance Law, 1939, at pp. 39-42, 50-52).

ROUND TABLE VII

FIDELITY & SURETY INSURANCE LAW

Henry W. Nichols, New York City, Presiding

"Various Aspects of a Surety's Right of Indemnity," by Clare M. Vrooman, Cleveland, Ohio

"Right of Exoneration," by E. Kemp Cathcart, Baltimore, Maryland

"Termination of the Surety's Liability," by George M. Weichelt, Chicago, Illinois

Fourth Period 3:30 P. M. to 5:00 P. M.

ROUND TABLE VIII

INSURANCE LAW PRACTICE AND PROCEDURE

Eugene Quay, Chicago, Illinois, Presiding

"New Federal Rules Relating to Discovery and Examination Before Trial as Affecting 'Insurers,'" by Frank E. Nesbit, Washington, D. C.

Report and study of the Federal District Court Rules relating to pre-trial practice, and a comparison of such as are substantially new with the previous federal and existing state court practice

ROUND TABLE IX

CASUALTY INSURANCE LAW

Hugh D. Combs, Baltimore, Maryland, Presiding

"The Liability of a Contractor," by Joseph G. Shapiro, Bridgeport, Connecticut

"The Liability in Tort of Theatres, Parks, and Other Public Places," by Robert D. Bartlett, Baltimore, Maryland

"What is Cooperation of an Insured Under a Casualty Insurance Policy," by Theodore L. Locke, Indianapolis, Indiana

ROUND TABLE X

FIRE INSURANCE LAW

Thomas Watters, Jr., Washington, D. C., Presiding

"Loss Adjustments Under Non-Waiver Agreements," by William H. Watkins, Jackson, Mississippi

"Legal Interpretations Involved in Co-Insurance Clauses," by Horace Michener Schell, Philadelphia, Pennsylvania

Review of Fire Insurance Decisions of the Year by Samuel Levine, Chicago, Illinois

Tuesday, September 10,
7:00 P. M.

ANNUAL BANQUET

Hon. Felix Hebert, Providence, Rhode Island, Master of Ceremonies

Floor show and music for dancing

No speeches

Wednesday, September 11,
2:00 P. M.

SECOND GENERAL SESSION

John W. Cronin, Chairman, Presiding

Reports of Committees, including statement on Round Table meetings:

Automobile Insurance Law
Casualty Insurance Law
Fidelity and Surety Insurance Law
Fire Insurance Law
Health and Accident Insurance Law
Life Insurance Law
Marine and Inland Marine Insurance Law
Qualification and Regulation of Insurance Companies
Workmen's Compensation and Employers' Liability Insurance Law
Insurance Law Practice and Procedure

"Misconduct of Counsel in Insurance Cases," by Earl F. Norris, Columbus, Ohio

General discussion by members of Section on any appropriate subject. (Remarks limited to five minutes, except by unanimous consent).

Report of Nominating Committee

Election of Officers

Adjournment

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

Monday, September 9,
2:00 P. M.

FIRST SESSION

Hon. John W. Kephart, Chief Justice, Supreme Court of Pennsylvania, Presiding

"War in the Waters of the Western World," by Professor William E. Masterson, Professor of Law, Temple University School of Law, Philadelphia.

Discussion of Prof. Masterson's paper, led by Mr. Edwin Ford, Jr., New York City

"Air Law versus Sea Law," by Howard S. LeRoy, Professor of Law, National University, Washington, D. C.

Reports of Committees:

Territorial Limits of Jurisdiction, Hon. Carroll L. Beedy, Chairman

Rights and Obligations of Neutral States, Mr. William S. Culbertson, Chairman

Treaties and Agreements, Mr. Lawrence D. Egbert, Chairman

International Commercial Law, Prof. Philip Warren Thayer, Chairman

Membership, Mr. John P. Bullington, Chairman

Comparative Law Relating to the Juridical Status of Women, Miss Catherine L. Vaux, Chairman

Latin-American Law, Col. William C. Rigby, Chairman

Simplification and Uniformity of Laws Governing Powers of Attorney Among Countries of the Pan American Union, Mr. David E. Grant, Chairman

Development of International Law Through International Conferences, Dr. James Brown Scott, Chairman

Tuesday, September 10,
10:00 A. M.

SECOND SESSION

William Roy Vallance, Chairman, Presiding

Reports of Committees:

Teaching of International and Comparative Law, Mr. James Oliver Murdock, Chairman
Discussion of report

Law Relating to Protection of American Citizens and Their Property in Foreign Countries and on the High Seas, Mr. James W. Ryan, Chairman

International and Comparative Law Aspects of Aeronautics and Telecommunication, Mr. Howard S. LeRoy, Chairman

Publications, Mr. Louis G. Caldwell, Chairman

Comparative Housing Laws, Mr. H. Milton Colvin, Chairman

Military and Naval Law, Col. Hugh C. Smith, Chairman

Proposed Treaty Concerning Great Lakes-St. Lawrence Deep Waterway Project, Mr. Ralph G. Cornell, Chairman

2:00 P. M.

THIRD SESSION

William Roy Vallance, Chairman, Presiding

"Enforcement of International Law in the Courts of Pennsylvania," by the Honorable John W. Kephart, former Chief Justice of the Supreme Court of Pennsylvania

Discussion of above paper. Speakers to be announced later

Reports of Committees:

International Law in the Courts of the United States, Mr. Edgar Turlington, Chairman

International Double Taxation, Mr. Mitchell B. Carroll, Chairman

International Judicial Assistance, Mr. Guerra Everett, Chairman

Comparative Land Laws, Mr. Heber H. Rice, Chairman

International Whaling Convention, Mr. Willard B. Cowles, Chairman

Pacific Settlement of International Disputes, Mr. William C. Dennis, Chairman

Restatement of International Law, Mr. William S. Culbertson, Chairman

Revision and Codification of United States Nationality and Immigration Laws, Mr. F. Regis Noel, Chairman

Report of Nominating Committee and Election of Officers

SECTION OF JUDICIAL ADMINISTRATION

Tuesday, September 10,

10:00 A. M.

FIRST SESSION

Hon. W. Calvin Chesnut, Baltimore, Maryland, Presiding

Report of Chairman as to current work of the Section

Reports by Mr. Paul B. DeWitt of the American Judicature Society and Mr. Paul F. Hannah, Chairman of the Junior Bar Conference as to progress of the factual survey of the existing state law and practice relating to the Section recommendations adopted in 1938, as conducted jointly by the American Judicature Society, the National Conference of Judicial Councils and the Junior Bar

"Pre-Trial Procedure," by Mr. Justice Bolitha J. Laws, Washington, D. C.

Panel discussion of above address

Consideration of suggested amendments of the By-laws of the Section

1:00 P. M.

LUNCHEON

Addresses on topics of interest to the judiciary by well-known speakers, to be announced later

2:30 P. M.

SECOND SESSION

Joint Meeting with

NATIONAL CONFERENCE OF JUDICIAL COUNCILS
SECTION OF CRIMINAL LAW, AND
JUNIOR BAR CONFERENCE

Hon. James W. McClendon, Texas, Presiding

Report by Arthur T. Vanderbilt, Chairman of Executive Committee, as to the work of the National Conference of Judicial Councils.

Presentation and discusssion of Report on Traffic Courts, prepared by the National Committee on Traffic Law Enforcement, under the Auspices of the National Conference of Judicial Councils.

SECTION OF MUNICIPAL LAW

Hon. Walter Chandler, Memphis, Tennessee, Presiding

Tuesday, September 10,

9:30 A. M.

FIRST SESSION

Greeting by Honorable R. E. Lamberton, Mayor of Philadelphia.

Chairman's Address: Honorable Walter Chandler, Mayor of Memphis.

"Federal municipal relationships; the legal effect of federal grants-in-aid on local self government," by Arthur A. Ballantine, New York City, former Under-Secretary of the U. S. Treasury, and Louis Brownlow, Chicago, Director of the Public Administration Clearing House, and Chairman of the President's Committee on Administrative Management.

General Discussion to follow.

"Annexation by judicial proceeding of territory adjoining a city," by Horace Edwards, City Attorney of Richmond.

Committee reports.

12:30 P. M.

LUNCHEON

JOINTLY WITH THE COMMERCIAL LAW SECTION

Messrs. Chandler and Lashly presiding.

Honorable Fiorello H. LaGuardia, Mayor of New York City, guest speaker.

2:30 P. M.

SECOND SESSION

"The interstate commerce clause and local municipal taxes," by William C. Chanler, Corporation Counsel of New York City.

"Administrative codes and codification of municipal ordinances," by Barnet Hodes, Corporation Counsel of Chicago.

"Selection of municipal law officers by competitive examination," by Murray Seasongood, Cincinnati.

General Discussion.

Committee reports.

Election of Officers.

SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW

Meetings of the Section of Patent, Trade-Mark and Copyright Law will be held Monday morning, September 9 and Tuesday morning and afternoon, September 10, the program to be announced later. The dinner of the Patent Section will be held on Tuesday evening, September 10, at the Aronimink Golf Club, Newtown Square, Pennsylvania.

COMMITTEE ON LEGAL AID WORK

Monday, September 9,

1:00 P. M.

LUNCHEON

followed by

FOURTH ANNUAL OPEN MEETING OF LEGAL AID COMMITTEES OF STATE AND LOCAL BAR ASSOCIATIONS AND OTHERS INTERESTED IN LEGAL AID WORK.

CONFERENCE ON PERSONAL FINANCE LAW

FOURTEENTH ANNUAL MEETING

Edmund Ruffin Beckwith, New York City, Chairman

Tuesday, September 10,

6:30 P. M.

Topic: Competition in small loans between regulated and unregulated recognized financial institutions.

INSTITUTE ON ADMINISTRATIVE LAW

Taking cognizance of the great and growing interest of the bar in the trial of controversies before administrative tribunals, the Section of Legal Education and Admissions to the Bar has arranged an Institute on Administrative Law to be held in connection with the forthcoming Philadelphia meeting of the American Bar Association.

The Institute will be held on Thursday afternoon and Friday morning, September 12 and 13. The topics to be covered will be essentially practical in nature, and the time will be devoted primarily to the discussion and examination of certain problems of adminstrative procedure. The subject matter will not be specialized in respect to particular administrative agencies, but will include typical procedural problems found in practically all administrative adjudication. Although the program is still being studied to the end that it may be made as practical and useful as possible, the following subjects will be given attention:

The Right to a Quasi-Judicial Hearing before an Administrative Tribunal.

The Formulation and Presentation of Issues for Adjudication—Use of Examiners in the Trial of Cases.

Rules of Evidence, Judicial Notice, and Presumptions in Administrative Adjudication.

The Manner of Securing Judicial Redress from Administrative Rules and Orders and the Scope of such Redress.

In connection with each of these topics and any others that may be considered, special emphasis will be placed upon the important cases decided within the last year or two. The widespread incidence of modern administrative law and the number of controversies now-a-days subjected to administrative adjudication bring virtually every active practicing lawyer into contact with administrative precesses. The technique of the trial of such cases is of general interest. The purpose of the Institute is to serve this interest and to offer the members of the American Bar Association a sound and practical discussion of the basic problems involved. A detailed outline and bibliography will be prepared and made available for distribution at the Institute.

The Institute will be conducted by Professor E. Blythe Stason, Dean of the University of Michigan Law School. Professor Stason has taught and written in the field of Administrative Law for many years. He will be assisted by several highly qualified members of the bar who will take active part in the presentation of certain phases of the subject matter. The meetings of the Institute will be held in Lincoln Hall at the Union League Club in Philadelphia. The Club is located one-half block from the Bellevue-Stratford Hotel, the headquarters of the American Bar Association.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

FIFTIETH ANNUAL MEETING

September 2-7, 1940

Monday, September 2

The morning and also the evening will be devoted to meetings of Sections and Committees for the consideration of their work and their reports and the further consideration of their tentative drafts of Acts to be presented. It is expected that such meetings will be at 10:00 o'clock A. M., and 8:00 o'clock P. M., respectively, or as soon thereafter as possible.

2:00 P. M.

FIRST SESSION

I. Address of Welcome.
II. Response.
III. Roll Call.
IV. Reading of Minutes of Last Annual Meeting.
V. Announcement of Appointment of Nominating Committee.
VI. Address of President, William A. Schnader.
VII. Report of Treasurer, Murray M. Shoemaker.
VIII. Report of Secretary, Barton H. Kuhns.
IX. Report of Executive Committee, John Carlisle Pryor, Chairman.
X. Reports of Standing Committees:
  1. Legislative, Lewis R. Benson, *Chairman.*
  2. Public Information, James Thomas Connor, *Chairman.*
  3. Appointment of and Attendance by Commissioners, Barton H. Kuhns, *Chairman.*
  4. Style, E. E. Brossard, *Chairman.*
XI. Reports of General Committees:
  1. Legislative Drafting, E. E. Brossard, *Chairman.*
  2. Uniformity of Judicial Decisions, Donald E. Bridgman, *Chairman.*
  3. Compacts and Agreements Between States, Robert S. Stevens, *Chairman.*

XII. Reports of Special Committees:

1. Cooperation with the Council of State Governments and the American Legislators Association, Nathan William MacChesney, *Chairman.*
2. Committee on Cooperation with the Interstate Commission on Crime, Charles R. Hardin, *Chairman.*

XIII. Reports of Sections:

1. Commercial Acts Section, Karl N. Llewellyn, *Chairman.*
2. Property Acts Section, George G. Bogert, *Chairman.*
3. Public Law Acts Section, John P. Deering, *Chairman.*
4. Social Welfare Acts Section, Sidney Clifford, *Chairman.*
5. Corporation Acts Section, W. E. Stanley, *Chairman.*
6. Torts and Criminal Law Acts Section, Albert J. Harno, *Chairman.*
7. Civil Procedure Acts Section, Frank M. Clevenger, *Chairman.*

XIV. Reports of Section Committees and Special Committees assigned to Sections.

8:00 P. M.

Section and Committee Meetings.

Tuesday, September 3,

9:30 A. M.

SECOND SESSION

Deferred Section and Committee Reports.
Consideration of Uniform Act for Judicial Review of Administrative Agencies, E. Blythe Stason, *Chairman.*

2:00 P. M.

THIRD SESSION

Consideration of Uniform Act on the Execution of Wills, Willard B. Luther, Chairman.

Wednesday, September 4,

9:30 A. M.

FOURTH SESSION

Report of Nominating Committee and Election of Officers.
Consideration of Uniform Firearms Act, Calvin W. Rawlings, *Chairman.*

2:00 P. M.

FIFTH SESSION

Consideration of Uniform Simultaneous Death Act (formerly Uniform Death in Common Disaster Act), James Thomas Connor, *Chairman.*
Consideration of Report of Special Committee on Uniform Criminal Statistics Act.

Thursday, September 5,

9:30 A. M.

SIXTH SESSION

Consideration of Uniform Real Estate Short Form Mortgage Act, William L. Eagleton, *Chairman.*
Consideration of Uniform Real Estate Mortgage Act, William L. Eagleton, *Chairman.*

2:00 P. M.

SEVENTH SESSION

Discussion of Methods for More Speedy and General Passage of Uniform Acts and of Tentative Plans for Cooperation With the Council of State Governments.

8:00 P. M.

EIGHTH SESSION

Consideration of Amendments to Uniform Negotiable Instruments Act, Karl N. Llewellyn, *Chairman.*

Friday, September 6,

9:30 A. M.

NINTH SESSION

Consideration of Uniform Vital Statistics Act, James C. Wilkes, *Chairman.*
Consideration of Uniform Fair Trade Practices Act, Ralph F. Fuchs, *Chairman.*

2:00 P. M.

TENTH SESSION

Consideration of Amendments to the Uniform Sales Act, Karl N. Llewellyn, *Chairman.*
Consideration of Uniform Act on Statutory Construction, William R. Shands, *Chairman.*

4:30 P. M.

Memorials.

8:00 P. M.

ELEVENTH SESSION

Consideration of Uniform Act on Survival of Tort Actions and Death by Wrongful Act, Paul Brosman, *Chairman.*

Saturday, September 7,

9:30 A. M.

TWELFTH SESSION

Consideration of Uniform State Business Codes Act, Frank E. Horack, Jr., *Chairman.*
Consideration of Uniform Vegetable Seed Law, Otis S. Allen, *Chairman.*
Consideration of Deferred Uniform Acts.

2:00 P. M.

THIRTEENTH SESSION

Consideration of Deferred Uniform Acts.
Consideration of First Tentative Drafts of Other Proposed New Uniform Acts.
Unfinished Business.
New Business.
Adjournment.

ROSS ESSAY CONTEST

Subject: To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?

II.

ESSAY SUBMITTED BY CHARLES ANTHONY RIEDL*

THE history of the courts of law shows that rules of procedure evolved from court decisions in connection with highly specialized forms of action. As long as all governmental authority was vested in the King, those who acted in his behalf did so solely because of the power delegated to them by him. The Parliament was considered to be a high court summoned by the king to tell him what the law was, rather than to assist him in making the law. From the royal delegation of the judicial power—to hear, try and determine controversies among His Majesty's subjects—evolved our concept of a curia—a court. Convenience, as well as necessity, caused the Courts to formulate rules of procedure, so that there would be an orderly method of presentation of the controversy, as well as some control over the manner of presentation. Up to the time of the Industrial Revolution in England, Parliament left the control and management of practice with the courts,[1] although it enacted statutes on rules of practice as aids to the courts.

In our country too, the Supreme Court of the United States at an early date by rule of court[2] considered that, as under the English practice, it had the power to regulate its own procedure. The judicial power under the Constitution was also vested "in such inferior Courts as the Congress may from time to time ordain and establish."[3] While we may concede that the rule making power is an inherent function of all courts on the two-fold ground of jurisdiction and necessity, the fact remains that the exercise of a supervisory jurisdiction by the legislature is justified on the ground of expediency.[4]

Early in the nineteenth century, the legislature was conceived to be the protector of liberty, and statutes were enacted to solve all political and legal problems. The regulation of procedure, which could have been handled more effectively by the court, was placed in the hands of the legislature. This was due in part not only to the fact that the common law procedure had to be modified, but also to the fact that the apprentice trained bar of the time thought of legal questions in terms of procedure, rather than as substantive law, with the inevitable result that "the details of procedure must be left to legislation if the separation of powers is to be maintained and the substantive law is to be under the control of the legislative department of the government."[5] The difficulty of distinguishing in practice between substantive and procedural law was sufficient to stop the courts from asserting that under the constitution control over procedure is denied to the legislature.[6] Rule by legislation resulted either because the courts abdicated whatever power they had to promulgate their own rules, except by decision,[7] surrendering it to the legislative branch of the government, or because the legislative branch usurped the power regardless of the courts' attitude in the matter.

Within thirty years after the adoption of the Field Code of Civil Procedure by New York in 1848, a majority of the states enacted practice acts or codes, because they held out the promise of simplicity.[8] Experience with the codes has proved that instead of achieving simplicity, they too in time have become rigid and highly formalistic. In fact, because of the difficulty of amending codes of procedure intelligently and promptly, they no longer meet the demands of the people.

The rule making power has been exercised by the federal courts in equity and admiralty cases since 1842, in bankruptcy since 1898, in copyright cases since 1909,[9] and in all civil actions since 1934.[10] Under the express authorization contained in state constitutions and legislative enactments, there has been an ever increasing use of the rule making power as an effective

*Editor's Note: As suggested in the June issue of the Journal, we publish herewith one of the essays submitted in the Ross Essay Competition—an essay which was not awarded the prize but is deemed to be of a high standard of excellence and effectiveness. The author of the essay published in this issue, Mr. Charles Anthony Riedl, is a member of the Milwaukee Bar.

1. Tyler, George Grayson—The Origin of the Rule Making Power and its Exercise by Legislatures, A. B. A. Rep., Vol. 61 (1936), p. 532-44.

2. In the August term, 1792, the United States Supreme Court laid down the following rules for practice before it:—
"The attorney general having moved for information, relative to the system of practice by which the attorneys and counselors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, the Chief Justice, at a subsequent day, stated, that the court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court: and that they will, from time to time make such alterations therein, as circumstances may render necessary."
2 Dallas 411; 1 L. Ed. 437.

3. Article 3, Sec. 1.

4. Chief Justice Marshall of the United States Supreme Court seemed to recognize this fact when he said:—
"The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature without the intervention of the Courts, yet it is not alleged that the power may not be conferred upon the judicial department."

5. Pound, Roscoe—Regulating Procedural Details by Rules of Court, Supplement to March, 1927, A. B. A. J., p. 12.

6. Rosenbaum—The Rule Making Authority in the English Supreme Court (1917), Ch. 1.

7. Supra, note 1, p. 537.

8. Root, Elihu—
"The code was brief, simple, quite general in its terms, and it swept away a whole mass of technical details and conformed the practice of law to the customs and habits of thinking and acting of the American people."
The Layman's Criticism of the Lawyer, A. B. A. Rep., Vol. 39 (1914), p. 386, 396-7.

9. Supra, note 5.

10. The rules which the Supreme Court promulgated thereunder did not become effective until September 16, 1938, three months after the adjournment of the second regular session of the 75th Congress.
Wayman v. Southard, 10 Wheat 1, 43; 6 L. Ed. 253.

way for improving judicial administration.[11] This rule making power becomes important when a rule adopted by a court *supplants* an existing statute.

There are four schools of thought on the rule making power. The first holds that since the courts are responsible for the administration of justice, the rule making power is an *absolute* one, and the legislative branch was never rightfully in the rule making field. The second theory is that the rule making power is an *inherent* function which is in the court since it has the duty to regulate its own practice and procedure.[12] The third theory is that the legislature in vesting the rule making power in the Supreme Court merely *restored* to the court the power which other legislatures had deprived it of or which the court had abandoned by not exercising it, and that since rule making is an attribute of a court, the court can exercise it absolutely. The fourth and better reasoned view is that the rule making power is a *legislative grant of power not exclusively legislative,* with the legislature retaining concurrent jurisdiction with the courts.

Authorities on the Constitution maintain that all power not essential to one of the three departments of government for the independent exercise of its constitutional function is vested in the legislature by virtue of its being the law-making department.[13] It would be difficult to prove that the power to prescribe rules for the admissibility of evidence is essential to the independent exercise of its constitutional function by either the legislative or the judicial branch of the government. While the power to prescribe rules of procedure is inherent in the courts, it is also a subject for legislative action.[14] It therefore follows that the exercise of the power to prescribe rules of evidence is not vested exclusively in either the legislature or the judiciary and neither department can exercise it absolutely to the exclusion of the other.

For the purpose of the discussion of our problem, we are concerned only with those rules of court which supplant, and do not supplement an existing statute. With this concept of rule making power, we then limit ourselves to a consideration of such power when vested in the supreme court, whether it be state or federal, with authority to control procedure in inferior appellate and trial courts.

It is necessary for us to distinguish briefly the grants of jurisdiction vested in the Supreme Court. These grants are—(1) original jurisdiction, (2) appellate jurisdiction,[15] and (3) superintending control over inferior courts. The original jurisdiction of the United States Supreme Court is limited to the specific cases which are provided for in Federal Constitution, because ours is a government of delegated powers. Since the several states possess all power not delegated to the Federal government, the respective legislatures, if not prohibited by the state constitutions, can enlarge the original jurisdiction of their state supreme courts. The appellate jurisdiction extends only to *a revision of the decisions of the inferior courts.* Under this power the supreme court merely examines the record to determine whether the trial court committed error. The appellate court does not approach questions of fact from the same standpoint that the trial court does. If the trial court applied correct principles of law, and its findings are not contrary to the great weight and clear preponderance of the evidence, the decision of the trial court cannot be disturbed on appeal. The appellate court searches the record to determine whether either the facts admitted over objection or the offers of proof were measured by the established rules for the admissibility of evidence, but it does not prescribe new rules. The appellate court determines questions of law for itself. The third grant of jurisdiction is that of superintending control, where by the use of writs specifically mentioned or referred to and authorized in the Constitution, the supreme court has the power to "control the course of ordinary litigation in inferior courts." It is under this grant of jurisdiction that the rule making power is vested in the supreme court by acts of the legislature.

In every case in which the act of the several legislatures in vesting this rule making power in the supreme court has been challenged it has been on the constitutional objection that it was a delegation by the legislature of its legislative power. The leading case is that decided by the Wisconsin Supreme Court, wherein the Court said—

"The power to regulate procedure at the time of the adoption of the constitution, was considered to be *essentially* a judicial power, or at least not a strictly legislative power, and there is no constitutional objection to the delegation of it to the courts by the legislature."[16]

In an earlier decision the Washington Supreme Court, in assuming the right of the legislature to make rules for the court and acknowledging its continued action therein, held that it does not follow that such action is a legislative function.

> "Not all acts performed by a legislature are strictly legislative in character. A failure to recognize this distinction often gives rise to the belief that one of our law making bodies has abdicated its duty, and attempted to transfer its legislative mantle to the shoulders of another body, not legislative, thereby subverting the purpose of its creation and denying the people of the commonwealth the right to have the laws which govern them enacted by their duly chosen representatives."[17]

A second ground usually advanced in attacking the constitutionality of the grant of rule making power to the courts was that it attempted to give to the supreme court power which was placed by the constitution in inferior courts. The courts consistently inquired into the practice existing at the time of the adoption of the

11. Marvel, Josiah—The Rule Making Power of the Courts, Supplement to March, 1927, A. B. A. J., p. 14-16; Harris, Silas A.—The Extent and Use of Rule Making Authority, Journal of the American Judicature Society, June, 1938, Vol. 22, p. 27-37.

12. 15 C. J. 901; 7 R. C. L. 1023.

13. Chief Justice Hughes in the consideration of the effect of emergency on constitutional power said—

"Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The constitution was adopted in a period of grave emergency. Its grants of power to the Federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. . . . While emergency does not create power, emergency may furnish the occasion for the exercise of power."

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398; 54 S. C. 231; 78 L. Ed. 413; 88 A. L. R. 1481.

14. Supra, note 4.

15. Article 3, Sec. 2, United States Constitution.

16. In re:—Constitutionality of Statute Empowering the Supreme Court to Promulgate Rules Regulating Pleading Practice and Procedure in Judicial Proceedings, 204 Wis. 501, 510; 236 N. W. 717.

17. *State ex rel Foster—Wyman Lumber Co., et al. v. Superior Court for King County, et. al.,* 148 Wash. 1; 267 Pac. 770, 771-2. Cf. also—*State of New Mexico v. Hyman Roy,* 40 N. M. 397; 60 P. (2) 646; *Ernst v. Lamb,* 73 Colo. 132; 213 Pac. 994; Annotation in 110 A. L. R. 22-59; A. L. R. Blue Book of Supplemental Decision (1939 Revision), p. 848.

constitution and concur almost unanimously in their opinion with the findings of Dean Pound that

> "this power of the highest court of general jurisdiction of the state, representing the King's Bench in the common law judicial organization, to make general rules of practice, which should govern also in the practice of inferior independent tribunals whose proceedings it had the power to review was recognized in American legislation."[18]

Since the reviewing court is charged with the duty of determining whether the rulings of the trial court have been such as to operate to the disadvantage of the litigants, it has been held that the reviewing court has power to make such rules.

A fundamental fact is that rules of evidence are intended as aids in the discovery of truth. Whether the rules in their present development have ceased to be effective aids in the sifting of truth from error is beside the point. It still remains true that in principle rules of evidence are helpful. They are formulations of the procedures which assist the human mind in the intricate process whereby it passes from ignorance through doubt and uncertainty to that final repose in one of two alternatives which we call certitude. There is such a thing as a science of proof, even though it falls far short of qualifying as an exact science, due to the variable element in human behavior. Rules can be devised which will make it at least less probable that error, rather than truth will be the result of an investigation. The common experience of men is proof of this. The human mind in its efforts to arrive at truth instinctively grasps certain types of facts as sign posts on the road to certitude and rejects others as misleading.

It is necessary for us to distinguish between rules of evidence, which are principles of proof, and those which affect admissibility. The former constitute a probative science; the latter are procedural rules devised by the law to guard against error unduly influencing the court or jury. The principles of proof represent "the natural processes of the mind in dealing with the evidential facts after they are admitted to the jury."[19] They are based upon the experience of human nature as represented in the witnesses, attorneys and jurors. Human nature will always be with us. Aristotle did not fail to point out the danger to be anticipated from the presence of this human, variable element in administering the law, this "element of the beast' as he so graphically described it. Aristotle said—

> "He who bids the law rule may be deemed to bid God and reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men."[20]

Today human nature is essentially the same as when Aristotle wrote about it. These rules recognize the logical process men use when they reason naturally, and since the rules are based upon some aspect of human nature, they serve not only as a warning but also as a safeguard to legal investigation of facts. While we are primarily concerned with the revision of these rules by rules of court, it should not obscure our minds to the common sense that is expressed in the rules.

Prior to the use of the jury, the accused or defendant stood a trial by ordeal, battle or compurgation. The accused or the defendant was cleared by being successful in ordeal or battle or by the oaths of persons who swore to his truthfulness or innocence. The taking of an oath whereby the person called upon God as a witness to the truth of his statement and considered himself bound in conscience was most effective because it was based upon the solid religious tenets of the people. The tribunal considered itself solely as witnesses to the trial, and could verify the observance of the trial, since the proof was the "decision of God"—"*judicium Dei.*" Upon the introduction of the jury system, the tribunal now became a "trier of the facts" and consciously evaluated the facts that it had. The jurors, however had to furnish the knowledge of the facts in themselves, aided only by the pleadings, since witnesses were not brought in to tell the jurors of their knowledge. The natural historical development was for the witnesses to become the chief source of information for the jurors, thereby placing great emphasis upon the witnesses, their words and documents. Then only did the question of admissibility arise, and the foundation was laid for the disqualification of witnesses and the rules of privilege. The next development was the recognition of the right of cross examination by opposing counsel. It was conceived to be "the most efficacious expedient" to disclose truth, but it has also become equally powerful in creating false impressions. The result was that by reason of multiplying oral questions, rules were formulated in greater detail. Evidence was finally, consciously and fully considered to be a system, especially with the printing of the court's decisions. Established principles and momentary discretion of trial courts developed into fixed and rigid rules and precedents. Apologies and treatises were then written on the system of evidence, thereby exposing it to criticism and inviting legislative reform. This resulted in England in the enactment of the Common Law Procedure Acts of 1852 and 1854. In our country too, as heretofore noted, statutes were enacted by the legislature in the realm of civil procedure. Up to about 1870 the courts, through opinions reflecting careful reasoning applied to the common sense of experience, restated established principles of the common law rules as modified or repealed by statutory reforms. This resulted in an elaboration of a finely reasoned system. If this problem in itself was not enough, it was multiplied by fifty jurisdictions, since new states were added to the Union, and the decisions of each state theoretically had an equal claim for consideration. Two factors that led to this wholly abnormal condition were the liberal spirit in each jurisdiction of testing the better rule, thereby opening the door to question all things ad infinitum and the lack of preemptory power in the supreme court to rule on evidence thereby resulting in the heaping up of decisions on identical points of evidence.

It has been suggested that the basic philosophy of rules of evidence, considered as a science of proof, revolves around four principal concepts, namely: ideals

18. Pound, Roscoe—Regulation of Judicial Procedure, 10 Ill. L. R. 171.

19. Wigmore, John H.—The Principles of Judicial Proof (2nd Ed.), p. 5.

20. Aristotle—Politics III, 16.

21. "(A) To satisfy deep rooted common law ideals of fair procedure. Illustrative are requirements of sworn testimony, opportunity for cross-examination and rebuttal, insistence that all evidence be formally introduced, and power to subpoena witnesses and documents.

(B) To present only trustworthy evidence before untrained lay juries. This produced such exclusionary rules as those concerning hearsay, opinion and best evidence.

(C) To shield, for social reasons, certain "privileged communications" made in confidential relationships, and

(D) To protect the citizen, accused of crime. This explains the right of confrontation, and the limitations upon self-crimination and involuntary confessions."

Stephan, Albert E.—The Extent to which Fact-Finding Boards Should be Bound by Rules of Evidence, A. B. A. J., Vol. 24, No. 8, p. 631.

of fair procedure, trustworthy evidence, privilege and self-crimination.[21] We are here concerned only with the Science of Proof insofar as it is the basis for the rules governing the admissibility of evidence. The primary purpose of these rules is to determine whether a certain offer of proof is *"worth considering"* before the same is presented to the jury as an aid to finding the facts, and not the "quantum" or weight to be given that specific piece of evidence either considered alone or along with all evidence introduced.

In the 1938 report of the Committee on Improvement in the Law of Evidence of the Section on Judicial Administration of the American Bar Association, an effort is made to eliminate the technicalities which have grown up around the rules governing the admissibility of evidence. Dean John H. Wigmore, the chairman of the committee stated:—

> I, for one, am ready to affirm my entire conviction in the solid merit of our system of evidence as a whole. We cannot afford to abandon its fundamentals.[22]

It is axiomatic that there are advantages in definite rules.[23]

The foundation of the common law rules of evidence is that there are certain things that the jury must not hear, and these therefore are to be excluded. The trend now is away from the hard fast rule of exclusion to that of the discretion to exclude. The emphasis will no longer be upon what facts one is to suppress, but rather what important facts one must bring out during the trial in order to prevail.

In its proposals involving specific rules of admissibility, the Committee on Improvement in the Law of Evidence chose twenty rules wherein the improvement would be "simple, feasible and necessary."[24] The probability of their adoption lies in the fact that the rules of evidence which have become static and serve no useful purpose can now be changed by the court under its rule making power.

In establishing the standard within which the court may prescribe rules of evidence under the rule making power, we should not become slaves to the terms "substantive law" and "procedural law." We recognize the fact that the distinction was made originally in a written opinion of a court, and later adopted in subsequent cases where it no longer was used to express a precise meaning. The result has been that because of carelessness in the use of the terms, or ignorance of the philosophical basis for the distinction, or the necessity of deciding cases swiftly, it is now impossible to determine what is meant by the terms "substantive law" and "procedural law." We therefore do not hesitate to abandon these terms. In a sense all rules of evidence are expressed in terms of procedure, since they create privileges, not rights. The American Law Institute in a chapter on Procedure, considers rules of evidence to be procedural in nature.[25] The sole exception is the so-called Parol Evidence Rules, since they are not rules governing the admissibility of evidence, but rather they "define the conduct or words to which legal consequences will be attached."[26] The prohibition cloaked in a rule of evidence does not of itself create a right. The sooner we break away from a standard expressed in these terms, the better will be our understanding of the rule making power.

The test we propose is whether a given rule of evidence is a device with which to promote the adequate, simple, prompt and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of a general public policy.

The expression of a general public policy leaves its impact on the rules of evidence. The law is confronted with the necessity of choosing between two desirable policies. It necessarily must vindicate one at the expense of the other, and it sacrifices a means of arriving at the truth for the general public policy. For example, there is the statutory rule that one cannot testify as to statements of, or transactions or communications with, deceased or incompetent persons. There is a great danger that the estates of deceased or incompetent persons would be despoiled by the introduction of such testimony. This rule, which is an exception to the rule that parties to a suit shall be competent as witnesses, is designed to discourage perjury and remove the opportunity for its commission. While this exception to a general rule of evidence is cloaked in procedure, it is in reality an expression of public policy. So too, the statutory privilege in the case of confidential communications or confessions made to a clergyman or priest in his professional character is an expression of public policy. While it might be desirable to compel the witness to disclose the secrets revealed to him in the confessional as an aid in arriving at the truth of the matter, the declared public policy is for the creation and recognition of this privilege as a means of enabling a person to reform and thereby become a credit, rather than a disgrace, to society. The norm is not whether the rule is enforced as a rule of procedure, but rather whether the rule creates a non-procedural policy. If the rule is an expression of general public policy, then it can be prescribed only by the legislature.

We do not claim that in the use of this standard one can absolutely determine[27] whether a given rule is grounded upon a desire to promote the administration of justice or upon a declared public policy. As to those rules which may fall in the "twilight zone," the doubt is to be resolved in favor of the legislature, because all power not essential to the independent exercise of its constitutional function by one of the three departments of government is vested in the legislature by virtue of its being the law making department. This policy is further indicated on the ground of expediency, because the rule making power is a *"lawful legislative grant of power not exclusively legislative"* and nothing would be gained—and perchance all be lost—if the court should take issue with the legislature, which thereupon might revoke the delegation of power. The Wisconsin Supreme Court said—

"In the field dealt with by this section there has

22. Plan to Rid Evidence Rules of their Fleas, Journal of Am. Judicature Society, Vol. 22, No. 3, p. 136.

23. "The desire for such certainty of ruling that a lawyer can prepare his evidence in advance with definite knowledge that it will be admitted as proof; and that a suitor may feel that justice is uniform regardless of the personality of its administrator, seems to dictate the statement of definite, rigid, technical rules which will establish the admissibility, or inadmissibility of evidence; common sense and logic seem to dictate that all logically relevant testimony, even though of slight materiality and doubtful weight and reliability, should be admitted in the sound discretion of the judge governed and limited only by those considerations of practical expediency which are applicable to the particular circumstances of each case."
Lehman, Judge Irving—Technical Rules of Evidence, 26 Col. L. R. 509, 512.

24. A. B. A. Rep., Vol. 63 (1938), p. 570-601, 581.

25. Restatement—Conflict of Laws, p. 595-8 incl.

26. Supra, note 19, p. 974.

27. The scope of the rule making power given the court "is not discernible by the application of some magic formula."
Davey, Edward V.—Courts—Rules of Court—Power to Change or Modify Rules of Evidence, Wis. Law Rev., Vol. 1938 No .2, p. 324, 328.

been a demand for reform—a demand far too insistent to indicate anything less than a corresponding need. The duty of Governmental bodies to respond to such demands is self-evident. It is also self-evident that such response as is made must be in accordance with the orderly processes and must be in conformance to constitutional limitations. The co-ordinate branches of the government, even in the face of such demands, should not abdicate or permit others to infringe upon such powers as are exclusively committed to them by the constitution. As to the exercise of those powers, however, which are not exclusively committed to them, there should be such generous co-operation as will tend to keep the law responsive to the needs of society."[28]

While the American Bar Association's Committee on Improvement in the Law of Evidence selected only those rules which represent a general practice, are most frequently involved and are the most obvious obstruction to a determination of the facts in jury cases,[29] it is our thought that in applying our standard we may be able to make a respectable beginning in determining which of those rules of evidence the courts would be able to prescribe under the rule making power. The proposed classification should not be regarded as final or inflexible, since as in a lawsuit there are always two sides, and what we now have listed as being an expression of general public policy may at a later date be considered as a lawful exercise of rule making power by the courts. In the accompanying table we have listed each proposal separately in the light of the reason for the rule and thereby determined whether or not it was an expression of general public policy. This decision necessarily controls the determination as to whether the proposed rule could be changed under court rule or whether that right is reserved to the legislature. Our conclusions are as follows:—

	Specific Rule	*Affects*	*To Be Enacted by*
1.	Survivor's Testimony against Representative	General Public Policy	Legislature
2.	Business Records	Rules of Procedure	Court
3.	Opinion Rule	Rules of Procedure	Court
4.	Expert Testimony	General Public Policy	Legislature
5.	Deceased Person's Statement	Rules of Procedure	Court
6.	Certified Copies	Rules of Procedure	Court
7.	Oath Administration	Rules of Procedure	Court
8.	Discovery before Trial	Rules of Procedure	Court
9.	Cross-Examination to One's Own Case	Rules of Procedure	Court
10.	Psychiatric Examination in Sex Complaints	General Public Policy	Legislature
11.	Attorney and Client Privilege	General Public Policy	Legislature
12.	Physician & Patient Privilege	General Public Policy	Legislature
13.	Privilege against Self-crimination	Bill of Rights	Constitutional Amendment
14.	Burden of Proof	Rules of Procedure	Court
15.	Proof of Foreign Law	Rules of Procedure	Court
16.	Evidence in Trials without a Jury	Rules of Procedure	Court
17.	Marital Testimony Privilege	General Public Policy	Legislature
18.	Novel Privileges	General Public Policy	Legislature
19.	Bona Fide Dispute of Facts	Rules of Procedure	Court
20.	Hearsay Rules Exception	Rules of Procedure	Court

We have found agreement with some of our conclusions in those few instances[30] where similar provisions appear in the New Federal Rules of Civil Procedure, which were adopted under the rule making power of the United States Supreme Court. We note that the Supreme Court of South Dakota, under the Judicial Proof section of its code, has prescribed rules[31] governing many of the proposals which we have reserved for enactment by the legislature. We do not feel, however, that apparently conflicting results in this field are necessarily in disagreement with our proposed standard. While it is always true that the test may be applied differently by different persons and from time to time, the fundamental validity of the criterion is not vitiated by the disagreement as to its proper application.

As we have heretofore mentioned, the rule making power was restored to the courts by the legislature for the twofold purpose of giving the people an efficient, adequate, simple, prompt and inexpensive administration of justice and placing the responsibility for that system directly with the courts.[32] While the court may prescribe the form and content of pleadings under this grant of power, our only concern therewith is that where the pleadings are made more simple, there is less opportunity for applying the rules of evidence.

While we have suggested a standard to be used as a guide by the court to ascertain whether the promulgation of a particular rule would be within its grant of power, we have said nothing about the statutes previously enacted by the legislature. It was the idea of Dean Pound that very likely the first rule the court would prescribe under the rule making power would be a provision "that the existing practice should obtain until superseded or altered."[33] The Wisconsin legislature in 1929 incorporated in the original rule making statute the very pregnant provision that "all statutes relating to pleading, practice and procedure shall have force and effect only as rules of court."[34] That provision metamorphosed all such statutes into rules of court. This could not be considered as a limitation upon, or a marking out of, the exercise of this power by the court, since it referred only to those statutes enacted *prior* to the rule making statute. The method of making over these previously enacted statutes into rules of court is not as important as the statutes themselves which relate to evidence and have not been superseded or altered. Wisconsin is recognized as one of the leading authorities in this field. We therefore use its statutes and decisions to illustrate the point. At

28. Supra, note 16, p. 513-14.
29. A. B. A. Rep., Vol. 63 (1938), p. 570-601, 581.

30. Proposal 6—Rule 44 provides for use of certified copies, but is only supplemental to other methods.
Proposal 9—Recommended by advisory committee in its preliminary draft (May, 1936) and in its report (Apr., 1937), but not as yet accepted by U. S. Supreme Court.
Proposal 10—Rule 35 provides for physical and mental examinations by a physician. We nevertheless contend proposal 10 is an "expression of general public policy" and must be enacted by legislature.

31. While the Code does not define substantive and adjective law because of the difficulty in trying to arrive at a satisfactory definition the Court nevertheless follows substantially the distinction made by one authority—
Substantive Law is defined as "those laws which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals."
Adjective Law is defined as "those laws which have for their purpose merely to prescribe machinery and methods to be employed in enforcing these positive provisions."
Willoughby, W. F.—Principles of Judicial Administration, p. 8.

32. Sunderland, Edson R.—Expert Control of Legal Procedure through Rules of Court, Supplement to March, 1927, A. B. A. J., p. 2.

33. Supra, note 18.

34. Sec. 261.18 Wis. Stats., 1939.

the time of the adoption by the legislature of the rule making statute in 1929, there were two specific statutes in effect which have not been superseded or altered. Both statutes refer to the state of the record during the trial and on the appeal. The first provides that

> "the court shall . . . *disregard any error or defect* in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."[35]

The second statute provides that

> "no judgment shall be reversed . . . in any action or proceeding, civil or criminal, on the ground of . . . the improper admission of evidence . . . unless . . . *after an examination of the entire action or proceeding*, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse the judgment . . . ."[36]

The phrase "substantial rights," which appears in both statutes, was construed in an early case "to relate only to the subject matter of the litigation and not to mere matters of practice which cannot affect that."[37] We therefore necessarily interject this question—What effect will either or both of these two statutes—that one must show prejudice by error, or that any *proper* evidence will support the ruling—have upon the application by the trial court of rules of evidence? It seems to be the logical conclusion that irrespective of what rule of evidence the court may prescribe, the trial court, in its discretion, may either *strictly* construe it and still not be reversed on appeal since there is proper evidence to support his ruling, or it may *liberally* construe the rule of court and also not be reversed because the aggrieved party has the burden of showing prejudice by the error. Just as in the case of more simple pleadings, so too by reason of two such statutes, individual rules of evidence become relatively unimportant because there is less opportunity for applying them.

While our fundamental premise is that the rule making power is *"a lawful legislative grant of power not exclusively legislative"* we should also recognize that in some states the rule making power is vested in the courts under the state constitution.[38] Even in those instances there has been little use made of the power, since on the whole the court waits upon the legislature to pass an enabling act so that it would not appear that the court seeks power on its own initiative. It is not a question of the power, but only the exercise of the power. The United States Supreme Court in subscribing to the maxim that when the reason for the common law rule ceases the rule also ceases, held that the federal courts had the power

> "in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced."[39]

Yet that same court waited upon the Congress to give it the rule making power and, in prescribing rules of evidence followed the recommendations of its advisory committee and "touched the subject as lightly as possible."[40] It is apparent, therefore, that even as to those courts which have been given the power under the Constitution, the same standard which we have suggested for the exercise of the rule making power could be applied.

This in summary then is our position. The court may prescribe rules of evidence either under the Constitution or by a lawful legislative grant of power which is not exclusively legislative in character. The standard is whether the rule is a device to promote the adequate, simple, prompt and inexpensive administration of justice or whether the rule, having nothing to do with procedure, is grounded upon a declaration of a general public policy. An additional aid would be rules which force the aggrieved party to prove that it was prejudiced by the error made in ruling upon the admissibility of evidence or that any *proper* evidence is sufficient to support the ruling upon the admissibility of evidence. While this standard cannot remove all the causes of dissatisfaction with the administration of justice, it will at least bring us a trifle closer to a realization of the "kingdom of justice on earth."

35. Sec. 269.43 Wis. Stats., 1939 (Italic ours).
36. Sec. 274.37 Wis. Stats., 1939 (Italics ours).
37. *Rahn v. Gunnison*, 12 Wis. 588, 591 (June, 1860).
38. Harris, Silas—Extent and Use of Rule Making Authority, Journal of Am. Judicature Society, Vol. 22, p. 27, especially table p. 30-31. Also Vol. 23, Journal of Am. Judicature Society, p. 65-6.
39. *Funk v. U. S.*, 290 U. S. 371; 54 S. C. 212; 78 L. Ed. 369.
40. The chairman of the advisory committee to the Supreme Court in its letter of May 1, 1936, to Chief Justice Hughes, said:

> "There is some difference of opinion in the Committee as to the extent to which the statute authorizes the Court to make rules dealing with evidence. We have touched the subject as lightly as possible. We felt it quite essential to go this far."

Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia (May, 1936), Foreword p. XVII.

Northwestern Law School Dormitory

ABBOTT HALL will be the home of the students of the professional schools on the Chicago campus of Northwestern University. The building is eighteen stories high, and overlooks Lake Michigan at Lake Shore Drive and Superior Street, one block south of Northwestern University Law School. It is constructed of Indiana limestone, and conforms in architectural style to the classroom buildings on the campus.

The building is about completed and will be ready for occupancy in September preceding the opening of the 1940-41 session.

CURRENT LEGAL LITERATURE

Among Recent Books

Ideas Are Weapons, by Max Lerner, 1939. New York: The Viking Press. 550 pages.

The author of this volume—a collection of essays, papers and reviews—was unknown to the reading public before he became one of the editors of *The Nation* and a frequent contributor to other advanced progressive periodicals. His first book, *"It is Later Than You Think,"* came to many as a revelation. Here was a fresh and vigorous literary talent, an independent and remarkably well-informed thinker, and a candid, realistic student of human behavior. Here is a radical who challenges attention, and whom open-minded conservatives cannot ignore.

The new book lacks the degree of unity which characterized the first one, but the point of view, or the philosophy underlying the views expressed, gives it a certain scientific coherence. The essays deal with ideas and their use in history, with influential personalities, living or dead, and with contemporary social movements.

Some are not only brilliant and suggestive, but adequate; others, though good and interesting, are too short to satisfy the expectation aroused by the theme or title. For example, the average reader learns little about Bagehot in the paper on that original writer or about his truly notable contribution to social and political thought. The paper on Graham Wallas also leaves something to be desired.

The best and ablest papers are those which discuss John Marshall, judicial review, legalism vs. justice, Holmes and Brandeis, Thurman Arnold, Laski and Pareto. The critique of old-style liberalism is penetrating and fearless. The discussion of literature and its social role is clear and sound.

Mr. Lerner knows his Marx, and is aware of the limitations and crudities of that revolutionary analyst and prophet. He would not be happy in any camp or sect, but all schools can read him with profit and gratitude.

Chicago. VICTOR S. YARROS.

Handbook of Admiralty Law in the United States, by Gustavus H. Robinson, 1939. St. Paul: West Publishing Co. Pp. xiii, 1025.

Admiralty is a phase of American law practiced by a comparatively small number of the members of the bar, and consequently is a subject which has not received the frequent treatment accorded to other branches of our law. Yet admiralty law is a body of concepts, international in character, having its roots in a past more remote than any of these other branches of law. The ancient "law of the sea" was adopted by the American colonies when they declared their independence in much the same manner as they adopted the common law. However, the basis of existing American admiralty law is our Federal Constitution, which contains the provision that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. This constitutional provision has been construed to place not only judicial authority, but also legislative power, in the Federal Government. This construction has been followed through the years and by judicial decision and statutory enactment the law of the sea has been adapted to our present needs.

Professor Gustavus H. Robinson, a member of the faculty of Cornell Law School, in his work, *Handbook of Admiralty Law in the United States*, has contributed to American legal literature a valuable elementary treatise on substantive American admiralty law from its origin to the present day. Professor Robinson has briefly, yet clearly and comprehensibly, treated the major topics of his subject. His book is one of the Hornbook Series and its use is simplified by the manner in which his several topics and their subdivisions are outlined and defined. The text is filled with numerous illustrations to clarify the topics discussed, apt comparisons of the existing law with ancient and foreign law, and current references to controlling cases, statutes and international conventions. The principal topics of this branch of the law have been condensed into one handy and valuable volume which is adaptable for use by practicing attorneys and students alike.

So for attorneys who have been impressed by such maritime terms as "general average", "amphibian torts", "bottomry bonds", "restraint of princes", "limitation of liability", "salvage", and "charter party", and who have wondered what these legal, yet unfamiliar, terms really mean, here is an opportunity, with a very reasonable amount of pleasant reading, to dispel the mists and mysteries surrounding the language and law of the sea. Professor Robinson not only has performed a real service for the admiralty bar, but also has made an interesting and important branch of our law readable and understandable for lawyers who have heretofore restricted their professional activities to matters concerning terra firma.

CODY FOWLER.

Tampa, Florida.

The Constitutional History of the United States, 1826-1876, by Homer Carey Hockett. 1939. New York: The Macmillan Company.

The author remarks in the preface to this book that a present day author "however conscious of the defects in his work can safely trust the reviewer to point out shortcomings which might otherwise escape attention." I do not feel inclined to respond to this invitation. This book is not only done with scholarly competence and thoroughness; it recounts in a fresh and fascinating manner the story of one of the most important periods in our constitutional history. I commend it to every practitioner of the law both for its excellent historical account of the period which it covers and for the indispensable light which it throws on the great constitutional problems of our own day.

This book is the second of a series of three volumes bearing the general title, *The Constitutional History of*

the United States, the first volume, recently published (1939), covering the years 1776-1826. The third volume is understood to be in preparation. The author treats the constitutional development of the period from 1826 to 1876 under four main headings, The Reaction against Nationalism, The Democratization of the Federal Government, The Constitutional Aspects of the Slavery Controversy, War and Reconstruction.

The events of this period are of modern significance because from the slavery controversy and the consequent war and reconstruction there came an accepted definition of the nature of the federal government and a general delimitation of the spheres of the federal and the state governments. Much that was said and written in the course of the bitter controversies over these questions has a surprisingly modern ring. Again and again the Supreme Court was subjected to scathing and unmerciful criticism. Jefferson in 1820 characterized the justices as "the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric," and again he declared (1821) that they were "ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what is gained . . . ingulphing insidiously the special governments" (pp. 7-8). Probably the Court reached the nadir of its prestige and power in the years following the Dred Scott decision. The caricature of the justices appearing in the New York Tribune immediately following the decision is reminiscent of *The Nine Old Men* of recent notoriety:

> "Wayne: 'before he got old, the ladies used to be enamoured of his flowing locks and general beauty of appearance, to which he was himself not wholly insensible.' Daniel: 'old, and long, and lean, and sharp in the visage.' Catron: 'whose erroneous opinions would, as a general rule, more often result from obtuseness than from original sin.' Campbell: 'middle-aged, middle sized, . . . and possessed of middling talent.' Grier: 'succumbs under touch, and returns into shape on its removal . . . Let Grier associate with none but honest men . . . and he would not disgrace himself.'" (p. 250)

Yet the Supreme Court rode out the storm, and again today it is enjoying a renewal of public confidence and prestige after its temporary "twilight" during another tempestuous period. And again it is confronted in a new form with problems of vital importance which were crucial in the days of which Professor Hockett writes,—the extent of the interstate commerce power of the federal government, the delimitation of the police power of the states, the definition of personal and corporate rights and privileges in terms of due process and the equal protection of the laws. It is impossible to grasp the significance of these problems today without a knowledge of their antecedents in this earlier period. Those who would straitjacket the power of the federal government to deal with social, economic and industrial problems on the basis of a theory of the division of federal and state powers would do well to contemplate the catastrophic consequences of the attempt to circumscribe federal power through the procedure of "Nullification." The constitutional doctrine of Calhoun, boldly characterized by that name, has long been dead, but it may take other forms as potent with constitutional and political strife as the original doctrine.

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Recent Legal Periodicals

BY KENNETH C. SEARS
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CRIMINAL ADMINISTRATION

PARDON: An Extraordinary Remedy, by Henry Weihofen, in 12 Rocky Mountain L. Rev. 112. (February 1940.)

An interesting short article objects that pardon is often used in place of parole and that pardon should be reserved for extraordinary occasions; that it is anomalous to use pardon to grant freedom to those convicted through error in our criminal procedure, and that our constant effort should be to perfect our administration of the criminal law so that error, that cannot be corrected through judicial procedure, would occur as seldom as humanly possible. Parole should be the method for normal release procedure, but several states, notably Texas, Idaho, Virginia, and Florida, use conditional pardons in place of parole. The objection to pardon is the tendency to make an arbitrary and unequal exercise of it and this is not conducive to confidence in the administration of justice. Even though there is a useful purpose for the pardoning power, there is no need for the conditional variety. In some states constitutional provisions present barriers to a completely satisfactory parole system but courts "which hold that parole is merely a 'type of conditional pardon' should learn something about parole."

CRIMINAL LAW

Moral Aspects of the Criminal Law, by Morris R. Cohen, in 49 The Yale L. Jour. 987. (April, 1940.)

It is not a sermon and it is not an abstruse discussion of theory for specialists. On the contrary, it is a pleasurable forty page consideration of many problems in the realm of criminal law and penology. The author indulges in no flights of fancy in order to startle the world for a short time with something new. He has his feet on the ground. Some of the topics discussed are: The traditional moralistic views of crime, the positivistic view, justice in punishment, is there a special physical cause of crime, are criminals feeble-minded, is crime an instance of atavism, the economic causes of crime, the principle of individual responsibility for voluntary acts, punishment as a means of preventing crime, and the individualization of punishment. One does not have to agree with everything stated to agree that the author has given us a treat.

CRIMINAL LAW

Political Crimes, by Elmer Million, in 5 Missouri L. Rev. 164. (April, 1940.)

Treason under the constitution, the Sedition Act of 1798, acts of the Civil War period against inciting rebellion and seditious conspiracy, and the statute of the World War period to punish threats against the President of the United States and the two espionage acts of 1917 and 1918, and the court decisions applying these acts receive the main consideration in this first installment of Professor Million's article. The author is not very definite in expressing his opposition to the general trend of federal court decisions but opposition there seems to be. "It is obviously arguable that such statutes violate the constitutional provision as to treason, but such arguments have met with very little suc-

cess." The Schenck case appears to be objectionable because the strongest statements of the accused "were quotations from well-known men." The Debs case seems to be condemned because Charles Sumner made equally violent remarks about the Mexican war and General McClellan's platform condemned the Civil War. The convictions under the espionage acts evidence "the extent of power which the people suffered the government to exercise during the emergency of war." The Supreme Court in The Draft Cases evaded constitutional objections that the draft act infringed on personal rights, freedom of religion, state's rights, and involuntary servitude. Query, how weak should Uncle Sam be in order to please the critics?

PRACTICE

Evidence of Survivorship in Common Disaster Cases, by John E. Tracy and John J. Adams, in 38 Michigan L. Rev. 801. (April, 1940).

A rather gloomy subject makes, at the hands of these authors, interesting and enjoyable reading. A common disaster occurs "whenever two or more persons die under such circumstances that it is difficult or impossible to determine which survived the others." There are three reasons why evidence of survivorship may become important: (1) ownership of property may be determined by a survivorship "of only a few seconds duration"; (2) it may be necessary to rebut a common law or statutory presumption of survivorship adverse to the claim of a particular litigant; and (3) because of the rule that the one asserting survivorship has the burden of proving it. In addition, courts apparently differ whether survivorship may be proved by slight evidence or whether there is some other standard. Most evidence offered in these cases is circumstantial. Ordinarily, the direct evidence is hopelessly conflicting. The difficulty with circumstantial evidence is not its admissibility but its probative value. Evidence involving the following facts may be of value, but not necessarily so: age, sex, physical condition, position of the bodies before, at, and after the disaster, and cadaveric changes. "In every case the attorneys should be alive to all possible sources of evidence." The best solution is to provide for the contingency of common disaster in insurance policies, wills, and trust instruments. Next best is a statute that disposes of property as a rule of property and not as a rule of statutory presumption.

PROCEDURE

Pleadings and Jury Rights in the New Federal Procedure, by James A. Pike and Henry G. Fischer, in 88 U. of Pa. L. Rev. 645. (April, 1940.)

The view that pleading has contracted a disease called "mergeritis," as charged by Professor McCaskill, calls forth a defense. Mergeritis is regarded as dangerous because, by merger instead of by uniting law and equity in their pleading aspects, there is a chance that constitutional jury rights will be destroyed. The first defense to the charge is to minimize its importance. The statistics speak. "In relation to *all* of the actions brought in the federal courts, but approximately 1.5% of the cases are at all likely to present a jury-trial problem." A similar figure emerges from a Connecticut study. Another defense is that "in this relatively small number of cases the retention of the historical forms of pleading will be of little or no help in solving the jury-trial problem." On the other hand, the right to a jury trial can be determined satisfactorily by making a combined use of notice pleading, discovery, and the pre-trial hearing.

PUBLIC LAW

The Constitutionality of the Posse Comitatus Act, by Walter E. Lorence, in 8 University of Kansas City L. Rev. 164. (April, 1940.)

One result of a Democratic House of Representatives during the first two years of the Hayes administration was the passage of the quaintly labelled posse comitatus act. The Democrats were angry because President Grant used many federal officials and also the army in the national elections. The Republicans, in control of the Senate, had to yield in order to obtain an appropriation for the army. The history of this episode is interestingly set forth. The act provided that "it shall not be lawful to employ any part of the army of the United States, as a *posse comitatus,* or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress. . ." The word "expressly" is the one that leads Major Lorence to the conclusion that the act is unconstitutional as an infringement upon the power of the President as commander in chief of the army and in conflict with his duty and his oath to faithfully execute the laws. But it is difficult to believe that the situation created by the act is a very serious one. There are Congressional acts which provide that the President may use the army and navy to execute the laws when there is an insurrection in a state, or obstruction of the ordinary course of judicial proceedings, or domestic violence that obstructs the execution of the law in a state and thus deprives its people of their civil or political rights. The author fears that there are many situations where the armed forces would be needed but where the use of them would not be "expressly" authorized. *Sed quaere.*

PUBLIC LAW

Cancers in the Constitution, by E. F. Albertsworth, in 28 The Georgetown Law Journal 723. (March, 1940.)

The conflict is between a constitution that protects "fundamental personal rights" and one that provides economic security by loans, subsidies, and doles. The strain of the latter conception produces the cancers, i. e. a lack of constitutional protection for the fundamental personal rights. They are of two types: A-1 "No ceiling on the power to incur governmental debts"; A-2 "No check upon monetary devaluation"; A-3 "No protection against enlargement of the executive power;" A-4 "No limitation upon Congress in enlarging the personnel of the Supreme Court"; B-1 "Limited protection against the federal taxing power"; B-2 "Limited restraint upon the federal spending power"; B-3 "Limited checks upon governmental competition." To eradicate the cancers, the American people must choose "the pathway of protection to 'fundamental personal rights' against government rather than that of economic security by government."

TAXATION

New Light on Gross Receipts Taxes—The Berwind-White Case, by Thomas Reed Powell, in 53 Harvard L. Rev. 909. (April, 1940.)

An elaborate review of this particular decision would indicate that it is of great significance. In any

event it is the first "upon full recognition and exposition" to sustain a "sales tax in the state of delivery to what has hitherto been regarded as an interstate sale or purchase, i. e., goods shipped in from without the state in fulfilment of a previous order for such goods from within the state." But there had been intimations that this decision would be forthcoming. The dissenting opinion of Mr. Chief Justice Hughes is not approved. The majority opinion of Mr. Justice Stone is approved with very little exception from a searching and critical mind. The decision is placed in its historical setting and this is the most interesting part of the article. What of the point made by the minority "that if the state of delivery is allowed to tax because of the delivery, the states of origin and of intermediate transportation are as much entitled to similar taxes on what goes on within their borders"? This possibility does not appear to be unthinkable but the author concludes: "So far as actual decisions go, the law of the moment says that the state of entrance may tax but the state of exit may not." It is well to remember that the New York Statute under consideration imposed no tax on a "transaction originating and/or consummated outside of the territorial limits of [the] city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

LAW OFFICE ORGANIZATION, III*

BY REGINALD HEBER SMITH
of the Boston Bar

III. THE ORGANIZATION AROUND THE LAWYERS

ORGANIZATION exists to enable each lawyer to do his best work, to give him information that may help him, and to let the firm as a whole know where it stands and where it is going. As the lawyers do their work, the service departments are functioning quietly without bothering the lawyers in the slightest, but they are keeping track of everything. They are constantly tabulating all records and preparing reports which the partners will receive monthly, quarterly, or at the year-end. For the smaller firm, one girl who is an accurate bookkeeper (and she need not be a certified public accountant) can do the whole job, and she can do it quickly if she has a good adding machine and computing machine, preferably driven by electric power instead of by hand.

The heart of the system is the cost system. Since it is the open sesame to all that follows, it needs to be described in detail. Cost accounting in a factory may be highly intricate; in a law office the principles are extremely simple.

A law firm knows what its expenses are. Based on past history it is feasible to estimate or budget them for a year in advance. During the year the estimates can be revised if need be but most items of cost are pretty definitely fixed at least for a year. Rent does not change since most office leases run for at least a year. With rare exceptions, we make changes in the salaries of junior partners, juniors, and all clerical assistants only at the fiscal year-end. Hence the largest item of expense is, like rent, quite definitely fixed. Stationery, postage, light, telephone, etc., do not fluctuate much from year to year.

Partners' Drawing Allowances

The partners' drawing allowances present the only problem. They are not guaranteed, they depend entirely upon the firm earning enough money to pay them. With us they are fixed by the partnership articles for a year and are then subject to reconsideration for the ensuing year. But their amount is known and for the cost system that is enough. While profits can be determined only at the year-end, the partners must live through the year, each has bills to pay monthly, and so his drawing allowance is paid to him monthly. It is paid even if the firm at that point shows an operating deficit. It is then in fact being paid out of capital. If the firm deficit increases too far, drawing allowances will have to be stopped. But every effort should be made to give each partner a regular allowance each month to live on. While the senior partners may reasonably expect their drawing allowances to be larger than the salaries of juniors, they need not be much larger. It is wise to keep them low. This helps to insure the ability of the firm to pay them regularly. In the end it makes no difference since what the partner ultimately receives depends upon the firm's showing for the year; his drawing allowance is simply an advance against his ultimate share of distributable profits. But our immediate concern is with costs. To get at costs fairly, everything that is in the nature of profits must be eliminated. Drawing allowances, therefore, should not include any element of profit. They are to be used in ascertaining costs. For this use they can be made sufficiently accurate by gearing them into the salaries of juniors and junior partners. Such salaries the senior partners have fixed; in the fixing they have meant to be fair but they have not intended to pay anyone more than he is worth. From that base, let them proceed to fix their own drawing allowances. It is reasonable to believe that a senior partner is worth more to the firm than a junior partner or junior. His drawing allowance may properly be somewhat more than their salaries. But for reasons of prudent management let it not be much more. The drawing allowances of different senior partners will be different, but it is advisable and helpful to keep them all, from the highest to the lowest, within a comparatively narrow range.

In working out the cost system, every item of expense is placed in one of two columns. The first column is called "direct productive expense." Here are included the drawing allowances of senior partners, the guaranteed salaries of junior partners, the salaries of juniors. The second column is called "indirect productive expense" or overhead. There are included clerical salaries, rent, telephone, light, insurance, social security taxes, reserve for depreciation of equipment, in fact

*This series of articles began in the May number of the Journal.

every operating expense that the office has other than the items already placed in the first column.

We total the first column and then total the second. The second total has a ratio to the first. The formula for the ratio is

$$\frac{\text{the total figure for overhead (2nd column)}}{\text{the total figure for direct expense (1st column)}} \times 100\%$$

The actual ratio is likely to be 100% or a little more. There is no vice or virtue in this ratio; it is just a mathematical fact.

Let us illustrate by using round figures. The total of drawing allowances and lawyers' salaries is $50,000. The total of all overhead is about exactly $50,000. The ratio is 100%.

$$\frac{\$50{,}000 \text{ (2nd column)}}{\$50{,}000 \text{ (1st column)}} \times 100\% = 100\%$$

What that means is that if a lawyer has a drawing allowance or salary of $5,000 he has got to carry $5,000 of overhead. Overhead expense, in other words, is distributed among the lawyers in proportion to their drawing allowance or salary. The junior with a salary of $2,000 must carry $2,000 of overhead, the senior partner with a drawing allowance of $10,000 must carry $10,000 of overhead expense.

That seems so simple that one is inclined to ask how accurate it really is. Detailed tests have proved that it is closely accurate and accurate enough for all practical purposes. The man who is paid $5,000 invariably has a somewhat larger and better office than one who is earning $2,000; he uses more stenographic service, requires more time from Accounts and Files, and so on. In our tests the dividing line came just about at $4,500. The man receiving that amount was carrying exactly his true share of overhead. Men earning more than $4,500 were carrying slightly more than their true overhead. Men earning less than $4,500 were carrying slightly less than their true share. This partial deviation from an absolutely exact cost determination keeps the costs of the younger men low and thus helps them get started. The senior partners consider this result wholesome and probably good statesmanship. The deviation is, after all, minor and it is a tremendous advantage to compute costs in so simple a way. Let it be noted that while the overhead cost allocated to an individual attorney may deviate from exactness, for the firm as a whole the cost is exact. Every dollar of overhead expense has been allocated to and among the attorneys who are the direct productive units.

If a man's salary is $5,000 and his share of overhead is $5,000, then his "quota" for the year is $10,000. He has to earn $10,000 to pay for himself and to pay for his allocated share of overhead. If every attorney earned exactly his quota the firm would end its year with all drawing allowances, salaries, and all overhead paid; but with neither profit nor loss. If one or more attorneys fail to earn their quotas by $2,000 but one or more attorneys have earnings that exceed their quotas by $2,000, the result will be the same—all drawing allowances, salaries, and overhead will be met but there will be neither profit nor loss. There can be no profit unless the earnings of all the lawyers in the aggregate exceed the aggregate of their quotas.

Now we can take the next step. The lawyer with the $5,000 salary has a quota of $10,000. He has to earn $10,000 and he will try to do so by selling his *time*. Every man is expected to work a standard number of hours a year. "Standard" does not connote "perfect," it simply means the number of hours experience indicates he actually will work on the average year in and year out. From juniors we expect 1600 hours a year, from partners 1520 hours and from older senior partners (men over 50) 1200 hours. Any firm might start with these figures as the standard expected hours and then, after keeping its own time records, should alter the "standards" to conform to its own experience. The sharp drop in the "standard" hours expected from older senior partners is that such men are commonly devoting more time to public service, to charities, their personal affairs require more attention, and lastly, it is prudent for them to slow down.

Cost Per Hour

We know the "quota" for each attorney and we know how many hours he is expected to produce. Divide the former by the latter and you have the attorney's *cost per hour*. To keep to our illustration, our $5,000 man has a quota of $10,000. If he is a junior he is expected to produce 1600 hours for clients during the year. 1600 hours into $10,000 equals $6.25 per hour.

If an older senior partner had a drawing allowance of $6,000, his share of overhead would be $6,000. His quota for the year would be $12,000. He is expected to produce 1200 hours. His cost per hour is $10.00.

There is no safe way to make a lawyer's cost *per hour* cheap. That is why he is engaged in a constant race against time. But the cost of a given case can be sharply reduced if the number of hours the lawyer (or his firm) must spend on it can be substantially reduced. An extreme illustration will clarify this. A lawyer could reduce his cost *per hour* by having no stenographer and typing all his letters, by having no telephone and delivering his messages by hand, by having an office with low rental in the suburbs and using the street car to get back and forth. He might even dispense with law books and use a public library. If he could eliminate every penny of overhead his cost would still be $3.12 per hour (if he is to earn $5,000 in the year) and it would probably take him five to ten times as long to handle a given case as his properly equipped rival. In that event his cost to get the case done would be very much higher than that of his rival at the bar.

Once the cost per hour of every attorney in the office is fixed, obviously the cost of any job can be told. Let us assume that in the John Doe-Advice case the junior with an hourly cost of $6.25 worked 10 hours. His cost is $62.50. Let us assume that the older senior partner worked 1.1 hours. As his cost is $10.00 per hour, the cost of his work on the case is $11.00. The total time cost is $73.50. That is the cost. Maybe the bill will be more than that, if so there is a profit; maybe it will have to be less, if so there is a loss. In practicing a profession knowledge of cost is a helpful guide towards arriving at a fair bill but it is not a determinant. However, if the bill must be below cost the firm at least knows what it is doing.

We can now take a final step called "prorating." In the case on which we have assumed an older senior partner and a junior worked, let us assume that a second junior with a time cost of $5.30 per hour worked five hours.

The senior partner (who is the responsible attorney) wishes to send out a bill and asks Accounts for a time cost report on the case. Accounts, by looking at the Time Service Ledger for the case, reports that the above three did the work, the time spent by each, and the total cost of the job which is $100.

After discussion in firm meeting a bill for $200 is approved. When the responsible attorney sends out the bill it is typed in triplicate. The original of the bill goes to the client, a carbon copy on green paper goes to Files, and a carbon copy on red paper goes to Accounts.

Accounts now has all the data needed for "prorating" this bill among the men who did the work. The prorating is purely mathematical. The prorating sheet would look as follows:

Attorney	*Cost per Hour*	*Hours Worked*	*Cost*	*Multiplied by Ratio of Bill to Cost*
Senior Partner A	$10.00	1.1	$ 11.00	$ 22.00
Junior B	6.25	10.	62.50	125.00
Junior C	5.30	5.	26.50	53.00
		Total Cost	$100.00	
		Bill approved at	200.00	$200.00
		Ratio bill to cost	2:1	

The figures in the last column are posted to the "prorating book" so that each attorney who has worked on this case gets his "prorating credit." A has a credit of $22.00, B a credit of $125.00 and C a credit of $53.00.

In any given case this method of prorating the bill may be grossly unjust. B may have done so poorly that C had to be called in to supplement him. Ideal justice would give C a larger credit than B. The advantage of the mathematical prorating plan is that it is impersonal. It avoids the ad hominem argument. As case after case is prorated the law of averages has its steadying remedial effect. A "prorating" method, whatever its defects, is infinitely superior to memory. At the end of a year no one can possibly remember just who worked on each case and how much time he spent, and what the cost and the bill were. By the prorating method, Accounts tabulates this evidence for every case immediately after the bill is sent out and the prorating credits for each man are kept cumulatively.

The system is thus steadily yielding data about each lawyer from three angles.

(1) His prorating credit (credit for work done).

(2) His credit for business (the total of the bills sent out in cases where he was the responsible attorney).

(3) His credit for profit on business (this is the excess of bill over cost).

In the fourth article we shall see how these three sets of data can be put together in order to arrive at a judgment as to each lawyer's worth to the firm.

Records of Firm Attorneys

Every three months Accounts gives to each partner two tables showing the cumulative record of every attorney in the firm. One table shows his credits for business and the profit on such business. The other table shows his quota (how much he is supposed to have earned) and his prorating credits (how much he actually has earned as determined by the prorating method These reports are not sent to juniors, but a junior, on his request, will be given his own figures. Thus each man can keep track of his own progress and the partners can keep track of the progress of the firm as a whole.

This scheme of periodic reports is not only informative, it also accomplishes a measure of publicity in the right quarters and publicity is the best discipline in the world. It is impersonal. If a man is not rowing his weight in the boat, no one has to tell him, he can see that for himself. Conversely, if a junior is making a brilliant record, the partners begin to consider whether the time has come to advance him to junior partnership.

A common trouble in law firms is that juniors who are developing rapidly may feel that their progress is not being recognized and decide to go elsewhere. A firm cannot flourish if it constantly loses its most promising material. Yet the partners, who have plenty of other things on their minds, may not realize that a new star is rising. But with a system of records, summaries of which are distributed periodically, the fact stands out boldly and demands attention.

The organization around the lawyers does one further thing that relates directly to the progress of their work. When the responsible attorney took in the case and made out his New Case Report, we saw that he put down in dollars the "estimated value" of the case. That estimate was copied onto his "case slip" and also on the carbon copy kept in the master file of all case slips.

Two or three times a year some one from Accounts checks up with each responsible attorney the estimated value of every one of his cases to see if the value should be revised. This check-up is a good deal like a house-cleaning. The lawyer finds cases that should be billed and so he calls for a time cost report. If some dead wood has accumulated, that should be cleaned out. When the lawyer is asked to revise his estimate, he then knows more about the case and its probable value than at the start. Normally he will revise the estimated value upwards. If the firm is continuing to spend time and money on a case it should be because it expects to get paid. Anyhow, the check-up serves to put the responsible attorney on notice.

The new case slip also shows the date when the case was received. If the case is getting old there may be good reason for it. Or the responsible attorney may find he had better stir things up and see if more rapid progress cannot be made.

As has been said, the true value of a case cannot be told until its termination. Up to that point an estimate is only an estimate and has a margin of error. But the total estimated value of all cases in the office is a significant fact for the partners. That total also contains a margin of error, but what is important is the *trend*. If the trend is going down and continues down the partners have some soul-searching to do, they have got to trim sail, and seek every possible way of cutting costs—generally by reducing their own drawing allowances first. From 1929 to 1932 every law firm went through this uncomfortable experience but those who could see it coming, made their readjustments by stages, and kept costs always under control suffered least. When the turn came they were ready to take advantage of it.

If the trend is going up, the partners face the converse problem. If the rising estimated value of work on hand in the office is due to the fact that there are substantially more cases coming into the office, that is a signal that it is about time to employ another junior, or possibly to seek another partner, otherwise the quality of the firm's work will deteriorate or the lawyers will get overloaded, try to do too much, some will break down under the pressure, and then a bad office situation will become dangerously aggravated.

Thus the "estimated value" method does enable a firm to look a little way ahead, to have at least a rough gauge by which to appraise its own future, and to make its plans accordingly.

(To be continued)

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

By Committee on Professional Ethics and Grievances
Hon. Herschel W. Arant, Chairman

Attorney May File Certificate of Bias, Though He Advises Against It, If His Client Insists

THE late Arthur Flegenheimer, alias Dutch Schultz, was a notorious alleged bootlegger and tax evader. He was indicated in the Southern District of New York for violation of the income tax laws. Following this indictment, on which he was not arrested, he was tried on an indictment in the Northern District of New York. The jury there failing to agree, he was retried and acquitted. No steps were taken to arrest him for removal to the Southern District of New York. By September 20, 1935, he made up his mind to surrender himself to the United States authorities in the District of New Jersey, and George S. Silzer, John E. Toolan and Harry H. Weinberger were retained as his counsel. In due course, he informed them that he would come to Perth Amboy, New Jersey. His counsel, conceiving that the surrender should be made to the United States Commissioner nearest to Perth Amboy, notified the Commissioner that their client would appear for surrender and fixation and bail. Thereupon the Commissioner called the office of the United States Attorney for the District of New Jersey and informed it of the intended surrender. That office replied that there was no charge there against the man, and it was unconcerned. The Commissioner then called the United States District Attorney's Office, of the Southern District of New York, informing it of the same fact and stated that he would give it an opportunity to be heard. Flegenheimer then came to the Commissioner and offered to give bail. The representative of the Southern District of New York appeared and with him the United States Marshal of the District of New Jersey, who had a bench warrant from one of the Judges of the New Jersey United States District Court. There was a discussion as to jurisdiction in the case. The Judge by phone directed that Flegenheimer be produced before him on the bench warrant and the Commissioner took no further action. Thereupon, Flegenheimer was taken before the Judge, the question presented being. Was there probable cause for the removal of Flegenheimer from New Jersey to the Southern District of New York. But pending a hearing of that question, which was never heard before the Judge or decided by him, an application was made by Flegenheimer for his release on bail, which was fixed by the Judge at $75,000. Flegenheimer contended that the bail was excessive and oppressive, but the Court refused to reduce it and declined to justify the bail offered in that amount by him. Following this, Flegenheimer, contending that the Judge was biased and prejudiced against him, filed an affidavit of prejudice. His counsel tried to induce him not to do so, but he resolutely held to his views and counsel, feeling that he was acting in good faith, made a certificate to that effect as required by the statute. Following this the Court filed an opinion, of which counsel complained that it wrongfully and without warrant reflected upon their professional integrity and conduct and irreparably injured their reputation. Following its opinion, the Judge below struck the affidavit of Flegenheimer from the files. Thereupon his counsel took an appeal to the Circuit Court of Appeals and asked the Court to intervene and relieve them from the alleged unwarranted charges against them, made by the trial judge. The government moved to dismiss the appeal, on account of the death of Flegenheimer. The Court said:

> "After argument and full consideration had, we are of the opinion that while the appeal should be dismissed, a grave duty rests on this court—in case it finds from the proofs that these counsel were unjustly charged with improper conduct—to protect the good name of the United States Commissioner and the counsel. After careful study of the record and the facts of the case as they appear, we are of opinion that it is the duty of this court, in case the record contains any wrongful aspersions on their character, to so hold and protect them in the performance of their duty as counsel. We find no reason for questioning the action of the United States Commissioner or his good faith and integrity of purpose in asserting that jurisdiction existed in him under the Act of Congress specified. Whether the Commissioner and deceased's counsel were right in their contention, or whether the court below was right in its contention that its bench warrant superseded the jurisdiction of the Commissioner, is a question not before us and not necessary to our decision. The sole question as to that proceeding is the good faith and integrity of the counsel and Commissioner in so contending. We find no improper conduct in the counsel of the deceased certifying to the good faith of deceased's affidavit of bias. It is not necessary for us to decide, and we do not decide, the question of whether that affidavit was well founded or not. That question is not before us and not necessary to our decision. But we find nothing to impugn the good faith of Governor Silzer and his associates in the surrender of the deceased to the Commissioner or in signing the certificate which the statute provided for. That they tried to induce the deceased not to file the affidavit does not imply that they used bad faith thereafter in signing it. As long as the deceased honestly believed that the Judge was biased and stated on what facts he based his opinion, it was his right to call on his counsel to give the certificate provided by the statute in order to have the question of bias determined. It seems, therefore, quite clear to us that the issue before the court was one of removal of the man it had in custody and the court was not called upon, in deciding that question, to pass upon the ethical conduct of the counsel. If they were guilty of anything wrong or unethical conduct, they were entitled to have that matter disposed of in a proper proceeding looking to their punishment or disbarment. So regarding, the appeal of the deceased is dismissed, but the opinion of the court below is ordered to be stricken from the record of this court, and for so doing we find support in the remarks of Chief Justice Fuller in *Green v. Elbert, 137* U. S. 615, 11 S. Ct. 188, 34 L. Ed. 792, and in the opinion and cases cited in *Keown v. Hughes,* 1 Cir., 265 F. 572. *Flegenheimer v. U. S.* 110 F. 2d 379, 380.

Pennsylvania County Court Imposes Restriction on Attorneys

The Court of Common Pleas of Delaware County has amended its rules of court by the addition of a rule

concerning eligibility of attorneys in divorce and habeas corpus proceedings, as follows:

> "34C. No attorney of this court who is the district attorney or an assistant district attorney of the county, or an employee in the office of the district attorney, shall represent as counsel directly or indirectly, either the libellant, respondent, or corespondent in any divorce proceedings instituted in this county or represent as counsel any party in proceedings by writ of habeas corpus for the custody of children, provided that nothing herein contained shall be construed to prevent any such attorney from concluding any proceedings now pending or already pending at the time of his election or appointment."

Alabama Requires Character Examination of Law Students

That an applicant for admission to the Bar must possess good moral character is a universal requirement, but its administration has probably nowhere been entirely satisfactory. Until relatively recently, there was no inquiry concerning the applicant's character until he applied for admission. Investigation was often then not very thorough and those charged with the responsibility of making it felt a just reluctance to deprive the applicant of his chance after he had invested his time and money in preparation for practice. The result doubtless was approval of many applicants about whose characters the investigators were doubtful. Notwithstanding the generally accepted rule that the burden is upon the applicant to prove that he possesses the qualifications for admission to practice, examiners apparently have felt generally that they must pass an applicant unless they can state clearly established facts which constitute an adequate reason for not doing so. Ascertainment that a young man has such character as fits him for the practice of law is exceedingly difficult, if not impossible, at the time he applies for admission. He has seldom been subjected to the type of temptation encountered in the practice and it is a mere guess as to how he will demean himself in practice. About the best that can be ascertained is that, up to the time of the investigation, he has not been guilty of any conduct that suggests that he would be likely to misbehave himself as a lawyer. No doubt there is a chance to make a better character appraisement when it is known three years in advance that a young man plans to apply for admission. He can then be watched, if there is any one whose business it is to watch him, and more time is also provided for adequate investigation of his past.

With this in view, Alabama joins the several states that now require registration at the beginning of law study. However, whether the adoption of the rule results in a better selected bar depends upon the extent to which those charged with the responsibility avail themselves of the opportunities the rule affords for more thorough investigation.

The writer is of the opinion that no great improvement is likely to be accomplished until administration of the character requirement is realistically approached. It is recognized that, in the nature of things, there can be no reliable determination in advance of admission that an applicant has the good moral character required of lawyers. If this is so, admission should be on the applicant's representation that he has good moral character and on the understanding that he will be called upon to show cause why he should not be deprived of his license when a question is raised as to his character. This would place upon him the burden of showing that he is fit as to character at any time after admission when the Court calls upon him to do so. At present the attorney, upon admission, acquires a franchise or property right, of which he cannot be deprived except for very serious professional misbehavior proved by evidence almost clear enough to convict upon an indictment. If the profession's standing in public esteem is to be improved, disbarment must be made easier. The lawyer's continuance as an officer of the court should at all times be dependent upon his ability to satisfy the court that he is fit to continue as such. The Court should not be obliged to prove his unfitness.

Lawyer May Refuse to Waive Immunity

In the May issue of this JOURNAL, at page 426, attention was called to a decision by the Appellate Division of the Supreme Court of New York suspending an attorney from practice for six months for refusing, in an investigation of ambulance chasing ordered by the court, to answer questions on the ground that his answers would tend to incriminate or degrade him. *In re Ellis*, 17 N. Y. S. (2d) 800. See Comment in 40 Columbia L. Rev. 708.

The decision in that and the companion case of *In re Grae*, 17 N. Y. S. (2d) 822 have been reversed. See 282 N. Y. 428, 26 N. E. (2d) 963, 282 N. Y. 435, 26 N. E. (2d) 967.

In the former case, at page 433, the Court said:

> "In considering appellant's reason for refusing to sign a waiver of immunity we note the fact that the verified petition by which the present disciplinary proceeding was instituted and which was signed by the special prosecutor appointed to aid the Special Term in conducting the inquiry, contains the allegation that by refusing upon the inquiry to sign a waiver of immunity the appellant 'wilfully and knowingly concealed and intended to conceal facts, acts and deeds, either connected with his practice of law or otherwise, some of which facts, acts and deeds were incriminating and degrading.' It is thus made to appear that the risk of prosecution, apprehended by the appellant, for acts connected with his practice and of a nature alleged to be 'incriminating,' was not unreal.
>
> "Finding in the circumstances disclosed by the record reasonable ground for appellant's belief that his own professional acts might become the object of the inquiry and might eventually subject him to criminal prosecution, we reach the question, did his refusal to sign a waiver of immunity constitute conduct prejudicial to the administration of justice, within the provisions of section 88, subdivision 2, of the Judiciary Law, sufficient to warrant disciplinary proceedings against him? . . .
>
> "It has been suggested that the inquiry ordered by the Appellate Division was not strictly a criminal proceeding. But where inquisition in such a proceeding may expose a witness to punishment for crime, he may invoke as his protection the constitutional privilege. *Matter of Rouss*, 221 N. Y. 81, 86, 116 N.E. 782. He may not claim the privilege 'when he is clearly contumacious, not acting in good faith, but making the claim as a mere pretext to avoid giving non-incriminating answers.' *Matter of Levy*, 255 N. Y. 223, 225, 174 N.E. 461, 462. But our courts have recognized the difficulty in most cases of anticipating the effect upon a witness of his answer to a given line of inquiry and so it has been ruled that, in the absence of conduct by a witness which is clearly contumacious, the witness must be permitted to judge for himself as to the effect of his answer. . . .
>
> "The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth

Amendment to the Federal Constitution became a basic principle of American constitutional law. 'It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.' *Matter of Doyle,* 257 N. Y. 244, 250, 177 N.E. 489, 491, 87 A. L. R. 418. Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding Justice Lazansky, in *Matter of Ellis,* 258 App. Div. 558, 572, 17 N. Y. S. 2d 800, 813, expressing the minority view at the Appellate Division: 'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.'

"It follows that, upon the facts disclosed by the record, the present disciplinary proceeding instituted against the appellant, wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable."

Decrease in Law School Enrollment

A report recently issued by the Section of Legal Education and Admissions to the Bar of the American Bar Association notes a substantial drop in enrollment in law schools in the United States during the past year. Last year, the enrollment was 37,406; this year, it is 34,539.

This was doubtless due in most instances to the increased entrance requirements and in other cases may have been the result of increases in tuition rates.

Of the 180 schools a minimum of two years of college preparation is required by 111, three years is demanded by 35, and a college degree is required by 10.

Among changes in bar admission requirements made during the year the report noted the action of the Kentucky Court of Appeals in providing for two years of college work as a prerequisite for the study of law and the change made in Kansas to require a college degree of all law students who apply for admission to the bar.

It was noted that there are still 180 schools, of which 102 (8 conditionally) have been approved, while 72 are unapproved by the Section.

OPINIONS ON PROFESSIONAL ETHICS

OPINION 201

(May 24, 1940)

BUSINESS PARTNERSHIP BETWEEN LAWYER AND LAYMAN—PATENT ATTORNEY—

A lawyer in business is governed by the rules of conduct of the profession. A business partnership between lawyer and layman is permissible unless the service rendered is regarded as practice of law when done by a lawyer.

1. Is it proper for a lawyer to enter into a proposed partnership with a person enrolled on the register of attorneys of the United States Patent Office as entitled to represent applicants in the presentation and prosecution of applications for patent, but who is not a member of the bar; provided clear indication is given in connection with the use of the firm name of the respective professional qualifications of the partners, and

(a) Provided the business of the partnership is strictly limited to the representation of applicants in the presentation and prosecution of applications for patent?

(b) Provided the business of the partnership is strictly limited to the representation of applicants in the presentation and prosecution of applications for patent and any one of the following undertakings:

(1) The rendering of opinions as to whether or not a patent can be obtained on a client's invention.

(2) The preparation of assignments of pending applications for patent or issued patents.

(3) The preparation of license agreements under pending applications for patent or issued patents.

(4) The rendering of opinions as to whether or not the claims of an issued patent are infringed by the manufacture, use, or sale of a submitted device.

(5) The rendering of opinions as to whether or not claims contained in a pending application would, if a patent were issued containing them, be infringed by the manufacture, use, or sale of a submitted device.

2. Is the propriety of entering into such a partnership affected in any way by the fact that the non-lawyer was enrolled on the register of attorneys prior to December 31, 1925, in view of the following provision of Canon 29 of the Canons of Ethics of the American Patent Law Association.

> "Partnerships or other associations for the performance of professional service either in or out of court, should not hereafter be formed between members of the Bar and non-members, and firm names or titles which include the name of a person not a member of the Bar should not be adopted or used; provided, however, that persons duly registered on or before the 31st day of December, 1925, as entitled to practice before the United States Patent Office, and in good standing at said date, shall be recognized as having the same status before the Patent Office as members of the Bar, if clear indication is given in connection with the use of the firm name or of the individual names of the members thereof, according to their qualifications as registered solicitors of patents or as attorneys-at-law."

3. Should the lawyer member of such a partnership (assuming the propriety of entry thereinto) engage in the practice of law on his own account, utilizing the office facilities of the partnership with the consent of the non-lawyer partner?

The Committee's opinion was stated by Mr. TAFT, Messrs. Arant, Houghton, Miller, Brown and Drinker concurring. Mr. Phillips was absent and did not participate.

It is not necessarily improper for a lawyer to engage in a business or to form a partnership with a layman for that purpose. But when a lawyer does engage in business he must conduct himself and his business with due observance of the standards of conduct required of him as a lawyer. And when the business is one which, handled by a lawyer, would be regarded as the practice of law, it continues to be the practice of law so far as the lawyer who is engaged in business is concerned. The fact that a layman also is permitted to render the same services does not alter this conclusion. (Opinion 57).

If the lawyer member of the proposed partnership should render any of the services contemplated in paragraph 1 of the inquiry his professional skill and responsibility as a lawyer would be engaged and consequently he would be practicing law. The fact that the lay member also is permitted to render the same services does not change the conclusion that the business of the proposed partnership would be the practice of law. And as Canon 33 prohibits a lawyer from forming a partnership with a layman for the practice of the law, the proposed partnership is condemned. Furthermore, such a partnership would violate Canon 34 which prohibits the division of fees for legal services with a layman.

This conclusion is a sufficient answer to paragraphs 2 and 3 of the inquiry.

OPINION 202

(May 25, 1940)

CONFIDENTIAL COMMUNICATIONS—It is the duty of an attorney not to divulge confidential communications, information, and secrets imparted to him by his client or acquired during their professional relations. This duty continues after the relation of attorney and client has ceased.

CONFIDENTIAL COMMUNICATIONS — Exception to the General Rule—Where a lawyer is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation.

CONFIDENTIAL COMMUNICATIONS — Exception to the General Rule—Where a client announces an intention to commit a crime, a lawyer may, with propriety, make disclosures to prevent the act or protect those against whom it is threatened.

A trust company held title to certain properties in trust for certain beneficiaries. The latter employed B as their manager to conduct sales and pay the proceeds over to the trust company. The trust company lent a large sum of money to the trust, secured by a lien on trust assets. After the trust had operated for several years an audit was made by public accountants who discovered shortages and embezzlements by B and reported that by reason of provisions of the trust agreement the trust company was liable therefor in an amount largely in excess of the loan. The officers of the trust company submitted the accountants' report to A, as its attorney, for his opinion. A gave an opinion in which, for the most part, he affirmed the trust company's liability as reported by the accountants. Shortly thereafter, an officer of the trust company requested A, as its attorney, to draft a contract between it and B reciting the loan and lien; that because of the existing depression the affairs of the trust are at a standstill; that the company is about to foreclose its lien; that to save expense it is willing in lieu of foreclosure to purchase the beneficial interest in the trust evidenced by outstanding certificates at such price as it considers fair; and for that purpose employs B as its agent to effect such purchase. A drew up the requested form of contract and turned it over to the officer of the trust company. With it he submitted a memorandum in which he stated that the proposed plan would only be proper if the trust company made full disclosure to the beneficiaries of the facts disclosed by the accountants' report and that if it carried out such plan without such disclosure, much greater liability on the part of the trust company might result.

Thereafter, A learned that the interest of the beneficiaries had been purchased by B with moneys furnished by the trust company at nominal prices and without such disclosure, with the apparent purpose of eliminating the beneficiaries and concealing from them B's embezzlements and the trust company's liability. Thereafter, A discussed the matter with his superior, the general counsel of the trust company, and learned that the latter was already apprised of the facts. Thereupon, A laid the facts before an officer and director of the company who had no previous knowledge thereof.

A member of the Association presents the following inquiries:

(1) A being convinced that self-interest will deter the executive officers from reporting the facts to the board of directors of the trust company, is it A's duty to make full disclosure to the board of directors?

(2) Certain of the officers of the trust company participating in the transaction are members of the bar. Are they subject to discipline and should A initiate the charges?

(3) While A is convinced that under the facts he is not subject to censure, he feels that after a long lapse of time he might be at great disadvantage in defending charges that might be made against him. Does this justify him in taking immediate action to protect himself, and if so, what action is ethically permissible?

The opinion of the Committee was stated by Mr. PHILLIPS, Messrs. Arant, Houghton, Brown, Miller and Drinker concurring. Mr. Taft was absent and did not participate.

Canon 37 provides:

> "The duty to preserve his client's confidences outlasts the lawyer's employment. . . . If a lawyer is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened."

Knowledge of the facts respecting B's defalcations, the trust company's liability therefor, and the plan to purchase the outstanding certificates was imparted to A as attorney for the trust company, and was acquired during the existence of his confidential relations with the trust company. He may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client.[1]

Had A been advised that the trust company intended to carry out the plan to purchase the outstanding certificates without making the disclosures which he advised should be made, and if such transaction would have constituted an offense against criminal law when carried out, he might have made disclosure at that time.[2] In Opinion No. 155 we said:

> "When the communication by the client to his attorney is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged. One who is actually engaged in committing a wrong can have no privileged witnesses, and public policy forbids that an attorney should assist in the commission thereof, or permit the relation of attorney and client to conceal the wrong-doing."

1. *People v. Gerold*, 265 Ill. 448, 107 N.E., 165, 178; *Murphy v. Riggs*, 238 Mich. 151, 213 N.W. 110, 112; Opinion of this Committee, No. 91.

2. Canon 37, supra; Opinion of this Committee, No. 155.

But, since it does not appear that A was advised of such intention on the part of the trust company, and since the transaction has been consummated, we conclude the exception is not applicable and that A must keep the confidences of his client inviolate.

Since, however, the board of directors of the trust company is its governing body, we think A, with propriety, may and should make disclosures to the board of directors in order that they may take such action as they deem necessary to protect the trust company from the wrongful acts of its executive officers. Such a disclosure would be to the client itself and not to a third person.

We are of the opinion that A may not, without consent of the trust company, institute disciplinary action against the officers of the trust company who are members of the Bar, if to do so would involve a disclosure of confidential communications to A.

Neither do we think A may initiate, without consent of the trust company, any proceedings to protect himself which would involve a disclosure of such confidential communications. He would be justified in making disclosure only if he should be subjected to false accusation by the trust company.

AMENDMENTS TO THE FEDERAL CONSTITUTION

Supreme Court, Not Congress, Final Authority as to Validity of Adoption

BY JAMES QUARLES
Of District of Columbia Bar

RECENTLY, the Supreme Court of the United States handed down its decision in *Coleman v. Miller*, 307 U. S. 433. The question involved was whether the action taken by the legislature of Kansas respecting the Child Labor Amendment was effectual as a ratification. The case, it seems to me, is one of far more than ordinary moment, particularly by reason of certain views urged in one of the opinions.

When the resolution for ratification was submitted, twenty of the forty members of the Senate of Kansas voted in favor of its adoption and twenty voted against it. Thereupon the Lieutenant Governor, the presiding officer, cast his vote in favor of the resolution. Later it was passed by the other house by a majority vote. The senators who had voted against ratification, and also three members of the House of Representatives, in an original proceeding in the Supreme Court of Kansas, sought a writ of mandamus to compel the Secretary of the State Senate to erase an endorsement on the resolution indicating that it had passed and to endorse instead the words "was not passed," and also to restrain the officers of the two houses from signing the resolution and the Secretary of State from authenticating it and delivering it to the Governor.

The plaintiffs contended (a) that the Lieutenant Governor was not a part of the legislature as to the matter in hand and hence had no right to cast the deciding vote, and (b) that the proposed amendment was no longer alive; this latter because of a previous rejection of it by Kansas and by other States and because of failure of ratification by the requisite number of States within a reasonable time, nearly thirteen years having elapsed since the amendment was proposed by Congress.

The State court denied the writ, and its judgment was affirmed by the Supreme Court of the United States, though upon grounds different from those assigned by the State court in rendering it. Moreover, there were four opinions in the Supreme Court: the opinion of the Court, by Mr. Chief Justice Hughes; an opinion by Mr. Justice Black concurring in the affirmance but dissenting in several particulars, in which opinion Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Douglas joined; an opinion by Mr. Justice Frankfurter also concurring in the affirmance but dissenting from the majority view that the plaintiffs had standing to sue, in which opinion Mr. Justice Roberts, Mr. Justice Black and Mr. Justice Douglas joined; and a short dissenting opinion by the late Mr. Justice Butler; joined in by Mr. Justice McReynolds.

Out of the variety of propositions advanced in the opinions above enumerated, I have chosen for this discussion the broadest and most basic, namely, the proposition, unequivocally maintained in the opinion written by Mr. Justice Black, that whether an amendment to the Constitution has been validly adopted is a question exclusively for the determination of Congress. Two brief excerpts from his opinion will suffice to show his position and that of the three justices who joined in it:

> "Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation." 307 U. S. 457.
>
> "Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion given wholly without constitutional authority." 307 U. S. 459.

Are the quoted propositions tenable? Is it the law, that the question whether an amendment has been adopted in the manner prescribed in and by the Constitution is one for Congress, and it alone, to decide; and that the courts have no jurisdiction in the matter?

My answer is a courteous but an unqualified negative; and the thesis sought to be sustained by what follows is that responsibility touching the constitutional validity of the adoption of amendments is very far from

being exclusively or finally legislative, but, on the contrary, that it devolves upon the judicial branch to pass ultimately upon the question if and when, in an otherwise appropriate proceeding, a decision of the case so requires.

Article I, Section 1, of the Constitution reads:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article III, Section 1, provides:

"The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

The Constitution makes five exceptions to this broad grant of the judicial power to the Supreme Court and the inferior courts. They are:

1. "The House of Representatives . . . shall have the sole Power of Impeachment." (Art. I, Sec. 2, cl. 5)

2. "The Senate shall have the sole Power to try all Impeachments." (Art. I, Sec. 3, cl. 6)

3. "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." (Art. I, Sec. 5, cl. 1)

4. "Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member." (Art. I, Sec. 5, cl. 2)

5. "The Judicial Power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (11th Amendment)

It is obvious, however, that none of these provisions in the nature of exceptions to the general grant of the judicial power to the court curtails or qualifies that grant so far as the subject of the present discussion is concerned. Indeed, the very fact that they were deemed necessary serves to emphasize the breadth of the general grant.

Article V is the one which provides for amendments. It reads:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which shall be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses to the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal suffrage in the Senate."

The matter of promulgating an amendment is governed by the following statute:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." 5 U. S. C., 160; 3 Stat. 439.

First of all, consider Article V itself. The proviso covers several items, each regarded by the framers of the Constitution as being of sufficient importance to be written in the fundamental law. They are:

1. That prior to the year 1808 no amendment should be adopted which should "in any manner affect"

(a) Clause 1, of Section 9, of Article I, which clause provides that

"The Migration or Importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each person."

or

(b) Clause 4, of that section, which clause provides that

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

And

2. That, at no time, shall an amendment be adopted which shall, without its consent, deprive any State of its equal vote in the Senate.

Now let it be supposed that an amendment placing restrictions upon the admission of immigrants from a certain foreign country had on January 1, 1808, been promulgated officially as being in effect, and that shortly thereafter the Federal authorities had taken into custody, and were about to deport, an immigrant from that country who had been duly admitted as such into the State of New York, but who was charged by the Federal authorities with having been admitted in violation of the amendment. And let it be supposed that in a *habeas corpus* proceeding it was shown that in one of the States comprising the bare three-fourths necessary for complete ratification of the amendment only one house of the legislature had voted on the resolution. Surely the courts would have had jurisdiction to adjudge the amendment void and to grant relief in such case, notwithstanding the promulgation. And this simply because the question presented, viz., whether the arrest of the petitioner and his being held in custody were lawful, obviously would have been a judicial and not a legislative one, and as such would have called for the scrutiny of every material step taken in the process of adopting the amendment purporting to warrant the arrest and restraint.

Or suppose Congress should propose, and that all the States, including Nevada, should be duly reported as having ratified an amendment which operated to deprive that State of its equal vote in the Senate, and that such amendment was promulgated by the Secretary of State as part of the Constitution. And suppose that in a suit by a qualified plaintiff it should be shown that the vote of ratification in Nevada had been taken by popular referendum instead of by its legislature. Scarcely, as it seems to me, could it be successfully contended in such a state of case that the court was concluded by the Secretary of State's proclamation, and hence that it was powerless to adjudge the amendment inoperative as to Nevada.

Coming next to the statute regulating the proclamation by the Secretary of State. It is to be observed that he is to take the prescribed steps when he re-

ceives official notice that an amendment has been adopted "according to the provisions of the Constitution." The quoted words are, of course, of vital significance; for unless an amendment has been adopted "according to the provisions of the Constitution" it fails of becoming a part of that great instrument. Furthermore, the words have a definite judicial quality and connotation. Indeed, the question of constitutional validity, with all it may involve, always and necessarily is a juridical question. This is evident not only upon principle, but in *Post v. Supervisors*, 105 U. S. 667, 668, the court, speaking by Mr. Justice Gray, declared it settled by the decisions that

> "Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury."

To be sure, it is for the Secretary of State, in the first instance, to decide whether he is warranted in issuing the proclamation; and a mere *prima facie* case of conformity with the requirements of the Constitution would be sufficient for such purpose. His functions in the matter, however, are purely ministerial and in no real or controlling sense judicial. Hence, quite clearly as it seems to me, it is the duty of the courts, to whom the judicial power of the government is entrusted and upon whom final responsibility in judicial matters rests, to pronounce finally on the question, if and when a proper case is presented.

For another reason scarcely can it be said that the proclamation of the Secretary of State imports verity, at least not in all essential particulars, or that it is conclusive upon the courts. In *Dillon v. Gloss*, 256 U. S. 368, it was held, by a unanimous court, that an amendment becomes effective on the day the last of the three-fourths of the States ratifies it, and not on the date of the proclamation of the Secretary of State, and that the court takes judicial notice of the former. And the crucial question in that case was as to the exact date the Eighteenth Amendment went into effect. It was recognized by Mr. Justice Black and his three associates that this *Dillon Case* is in direct conflict with their theory, and they argue that it should have been overruled in *Coleman v. Miller*. But evidently the majority of the court were of a different mind.

The only authority cited by Mr. Justice Black to support his proposition—stated above in the first quotation from his opinion—that the proclamation of the Secretary of State that an amendment has been duly ratified spells finality, in *Field v. Clark*, 143 U. S. 649. That case, however, granting that it was correctly decided, involved merely an act of Congress, not the adoption of an amendment to the Constitution; and that fact alone would seem enough to discredit it as authority in the present connection. Even were it conceded that, as a matter of sound principle, it is permissible for a court to indulge presumptions of regularity and validity, and to treat certificates as conclusive, in respect of the passage of ordinary bills and joint resolutions, it would not at all follow that such course is justified or allowable when dealing with the far more serious matter of the adoption of an amendment to the organic instrument in our federal system.

And that a distinction is to be drawn between ordinary processes of legislation and the steps involved in the adoption of an amendment to the Constitution, was expressly recognized and declared by the Supreme Court in the early case of *Hollingsworth v. Virginia*, 3 Dall. 378 (1798). There it was contended that the Eleventh Amendment had not been legally adopted, because the President had not signed the resolution proposing it. But the court held that Article I, Section 3, clause 3, of the Constitution, which clause provides that "Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President, etc." applies only to ordinary legislation. It said:

> "The case of amendment is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and resolutions of Congress."

More than this: A hundred and twenty-two years later, in *Hawke v. Smith*, 253 U. S. 221, 229 (1920), the Court held that, in reality, the ratification of an amendment is not *legislation* but something different. It said:

> "Ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."

It is true, however, that in *Leser v. Garnett*, 258 U. S. 130 (1922), which did relate to the ratification of an amendment, the court stated that the proclamation of the Secretary of State was conclusive, but it merely cited *Field v. Clark*, and apparently without having in mind the important difference it had, in earlier cases, pointed out between ordinary legislation and the adoption of an amendment to the Constitution; and without undertaking to fortify the assertion with any argument based upon principle.

But is *Field v. Clark* clear and sound authority for the contention that the courts are concluded even in the matter of ordinary bills and resolutions? In that case it was claimed that the bill as signed and enrolled lacked a section which the committee reports and journals of the two houses revealed it should contain. And while the opinion has in it language tending to sustain the view that, as to ordinary legislation, the court will not go back of the enrolled bill, the question, at bottom, was treated by the court as being one simply of evidence: that is, whether the journals, committee reports, or the enrolled bill was the best evidence of what provisions the bill as actually passed contained; and it held the enrolled bill to be the best evidence.

However, it is devoutly to be hoped that the court has not abandoned, and that it will never abandon, the sane, thorough-going, and time-honored juristic principle enunciated by it in *Gardner v. Collector*, 6 Wall. 499, 511, where, speaking by Mr. Justice Miller, it held:

> "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or the time when a statute took effect, or the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

The principle underlying the above canon smacks of the very essence of the judicial idea, and should, therefore, always characterize the judicial process. And if, as the court there said with so much deliberateness and solemnity, the rule is to be followed when dealing with

a statute, the bounden duty of observing it in the immeasurably more important matter of the adoption of an amendment to the Constitution is manifest. How, then, can it be said that the proclamation of the Secretary of State is conclusive, when, somewhere along the line, an omission or a mistake respecting a vital step in the procedure may have preceded that declaration? Certainly the proclamation would not operate as a cure.

The *proposal* of an amendment is indeed a political matter and hence lies solely within the province of Congress; but whether in the process of adopting the amendment so proposed the method and safeguards prescribed in the Constitution have been followed and heeded is just as definitely a judicial question. Hence, it is for the final decision of the magistracy into whose hands, by the express terms of the Constitution, has been committed "the judicial Power of the United States."

Nor let it ever cease to be borne in mind in this connection, that the Supreme Court never exercises, nor can it exercise, the power vested in it except in "cases" and "controversies"; which is to say, only in actual litigation in which is involved some substantial personal or property right or interest of an individual or other proper party. Therefore, to refer to the function as a "veto" power, as has been done at times, is to misstate the fact and to mislead the uninformed.

And the consummate wisdom of the fathers in thus confiding the judicial power of the Republic to the Courts and not to Congress or the Executive, and thereby entrusting the ultimate guardianship of the Constitution to the Supreme Court, would, in the light of our recent history, seem nothing short of an instinctive prescience. But there is nothing automatic in printed words. The Constitution is not self-executing. Human agency is indispensable. Hence, in the final analysis, the fidelity of that court to its responsibility, and the intelligence and courage with which it acts, will, of course, always depend upon the personal character and calibre of the men who from time to time constitute it.

WASHINGTON SERVICES TO MEMBERS

The Supreme Court Opinion Service will furnish at $1.00 each, copies of opinions by *airmail* as soon as available from the printer. The opinion usually may be had within 24 hours after the decision is announced. The Supreme Court's docket number and the name of the case should both be stated, if known. When these are not known, sufficient description of the case should be given so that it may be readily identified.

The Document Service is an additional service to members. It will furnish other current government documents, publications, and reports, available in Washington, on a similar basis, the base charge for each item requested being $1.00. To this will be added the cost of the document, when not obtainable free, and the cost of mailing; both of which, when known to the member, should be added to the $1.00 for each document and enclosed with the request. *Regular mail will be used in this service unless otherwise requested and extra postage added to the remittance.* It is not contemplated that formal bills will be rendered for cost of the publications and postage where these amounts being unknown, are not sent with the request; but the member will be advised of the amount due at the time the material is sent. In order to provide this service at such a nominal cost, it will be necessary to keep down to a minimum the correspondence in connection therewith.

Requests under both the above services, should be sent to the American Bar Association, 1152 National Press Building, Washington, D. C.; and all checks drawn to the Association.

To Members of the American Bar Association:

We print below a membership application form for your convenience, in the event that you have a friend or associate whom you wish to propose for membership.

Applications filed during the period between July 1 and September 30 should be accompanied by initial dues of $8.00, or $4.00 if the applicant has been admitted to the bar less than five years.

Application for Membership
AMERICAN BAR ASSOCIATION
1140 North Dearborn Street
Chicago, Illinois

Date and place of birth .....

Original admission to practice ..... State ..... Year .....

Other states in which admitted to practice (if any) .....

Bar Associations to which applicant belongs .....

.....

White ☐ Indian ☐ Mongolian ☐ Negro ☐

Name .....

Office Address ..... Street ..... City ..... State .....

Home Address ..... Street ..... City ..... State .....

Endorsed by ..... Address .....

Check to the order of American Bar Association for $..... is attached.

VOLUME OF JUDICIAL DECISIONS

ONE of the constantly repeated complaints about our jurisprudence in America, for more than half a century, has been directed toward what has been called the "Bulk" of our Judicial Decisions. Nearly every writer and commentator on the point has been pessimistic, and none of them in all that time, has offered any very constructive suggestions. As a matter of fact, there have never been any authentic statistics either kept or worked out about these matters, and the writers were always talking in general terms. A student of the problem of "Bulk" finds himself badly handicapped because of this lack of authentic figures. For example, a century ago in 1840, there were approximately 50,000 reported decisions in all our Federal and State courts. These figures are authentic and can be proved. But where is the lawyer, or even the student of jurisprudence, who can establish these figures? The figure of 50,000 decisions a century ago compared to approximately 1,800,000 reported decisions in 1940, is indeed a strong argument in favor of overwhelming "Bulk."

However, the fact is that for about two decades there has been growing evidence that the crest of the flood has been reached. That statement may come as a pleasant surprise to many of the profession, but it is nevertheless true. The total annual output of reported decisions, for example, has "leveled off" since about 1920. In the years since that time the gross number of reported decisions in the entire Reporter System has averaged about 20,000 cases each year; and this in spite of the fact that the population of the country has substantially increased, in those two decades, and the total amount of business in the nation has probably more than doubled. There is solid ground for future optimism in these facts. However, as we have suggested, these are matters which have been little investigated by legal writers and about which the profession knows practically nothing.

Michigan Figures

We now have detailed statistical proof from one important State which sustains the optimistic estimate given above. The "Judicial Council of Michigan," which is created by statute, has recently published its ninth annual Report.[1] Under the heading "Volume of Judicial Business" the Report says:

Supreme Court

"The Supreme Court has had a large decrease in the amount of business since 1936. In 1934 the court wrote and published 484 opinions, in 1935 there were 431 opinions, in 1936 there were 517 opinions, in 1937 there were 480 opinions, and in 1938 there were only 388 opinions. (See Table I.) The number of cases docketed for hearing was 390 in 1938 as compared with 481 in 1937 and 520 for 1936; the number of interlocutory motions heard in 1938 was 501 as compared with 496 for 1937; and the number of cases heard on oral argument in 1938 was 250 as compared with 288 in 1937. (See Table II.)"

The Tables concerning Supreme Court business are as follows:

1. Published by Callaghan & Company, 1939.

TABLE I

Cases Disposed of by the Supreme Court of Michigan by Written Opinions, 1915-1938

Year	No. of Judges	No. of Written Opinions	Opinion Load Per Judge
1915	8	561	70.1
1916	8	461	57.6
1917	8	530	66.2
1918	8	441	57.1
1919	8	373	46.6
1920	8	371	46.4
1921	8	420	52.5
1922	8	520	65.0
1923	8	497	62.1
1924	8	475	59.4
1925	8	459	57.4
1926	8	464	58.0
1927	8	506	63.2
1928	8	557	69.6
1929	8	510	63.7
1930	8	528	66.0
1931	8	547	68.4
1932	8	676	84.5
1933	8	613	76.6
1934	8	484	60.5
1935	8	431	53.9
1936	8	517	64.6
1937	8	480	60.0
1938	8	388	48.5

TABLE II

Comparative Data on Supreme Court Docket Over the Period 1931-1938

	1931	1932	1933	1934	1935	1936	1937	1938
Number of cases docketed for hearing	549	671	618	485	434	520	481	390
Number of interlocutory motions heard	607	590	664	581	506	582	496	501
Number of cases submitted on briefs	329	409	358	266	270	255	193	140
Number of cases heard on oral argument	220	262	260	219	164	265	288	250

Trial Courts

Figures are also given concerning the volume of business in the trial courts of the entire State. On this point the Report is brief, but gives some interesting statistics:

"There has been a very slight decrease in the number of law cases commenced in the circuit courts of the State as compared with the year 1937, and a very substantial decrease in the number of chancery cases commenced.

Comparative figures for the last seven years are as follows:"

New Cases Commenced During Each Year, 1932, 1938 In All the Circuit Courts and the Superior Court of Grand Rapids

	1932	1933	1934	1935	1936	1937	1938
Law cases	16,018	11,192	10,788	11,398	11,550	12,838	12,663
Chancery cases	21,520	22,026	25,050	28,031	25,504	25,607	21,075
Total	37,538	33,218	35,838	39,429	37,054	38,445	33,738

Incidentally we have in this issue, of the JOURNAL, an interesting discussion of Pre-trial procedure in the Federal Courts. In connection with that article, and generally, the following interesting discussion appears in the Michigan Report:

Pre-Trial Hearings in Wayne County

"The results of the pre-trial procedure developed in the Wayne County Circuit Court become more striking each year. In 1935 there were 4,965 cases ready for trial, and of these 2,016, or 40.6 per cent, were finally disposed of on the pre-trial hearing without any trial. In 1936, out of 5,834 cases ready for trial, 2,886, or 49.5 per cent, were finally disposed of on the pre-trial hearing. In 1937, out of 5,798 cases ready for trial, 3,198, or 55.1 per cent, were finally disposed of without trial at the pre-trial hearing. In 1938, out of 5,839 cases ready for trial, 3,533, or 60.5 per cent, were finally disposed of without trial at the pre-trial hearing. (See Table III.)

In Wayne county only 12 per cent of all the cases disposed of were actually tried, while in all of the circuits outside of Wayne county 22 per cent of the cases were tried. It would seem fair to conclude that this difference represents the effect of the pre-trial procedure.

The large and rapidly increasing number of cases finally disposed of on the pre-trial hearings suggests the danger that this practice may tend to develop a pressure for settlements beyond the point where it would serve a desirable public purpose. Such a result should be carefully guarded against."

The Table concerning Pre-trial procedure in Wayne county is as follows:

TABLE III

Pre-Trial Procedure in the Wayne County Circuit Court

	1935	1936	1937	1938
Number of cases finally disposed of on pre-trial hearing.....	2,016	2,886	3,198	3,533
Number of cases finally disposed of by trial	2,949	2,948	2,600	2,306
Total cases ready for trial....	4,965	5,834	5,798	5,839

Need for Better Judicial Statistics

The value of such authentic statistics as are found in the Michigan Report, is obvious. It would be a good thing for the profession, and for our national jurisprudence as well, if we had similar authentic figures for every State and for the Federal courts.

A commendable step in this direction was taken by Congress within the last year in creating the new "Administrative Office of the United States Courts." The appointment to that office of Mr. Henry P. Chandler, a Chicago lawyer, is also a matter of outstanding significance. Anyone who heard the strong commendation given to Mr. Chandler and the work of his office by Chief Justice Hughes in his address before the Law Institute May 15th last, could not help but realize the significance both of the creation of that office and the appointment of Mr. Chandler to his important post.

It is also a matter of satisfaction that Mr. Chandler has set up what is called a Statistical Division in his office, which has been placed in the capable hands of Mr. Will Shafroth as Director.

These things are all definite steps in the right direction, and will no doubt give impetus to the movement for authentic statistics about Judicial Business in all our courts, Federal and State alike. U. A. L.

CURRENT EVENTS

Lawyers of Continent Unite

Washington, June 16

AN Inter-American Bar Association, long a dream of lawyers all over the continent, reflecting their desire for effective Western Hemisphere solidarity in the field of law, has at last become a reality.

The organization was created at the Eighth American Scientific Congress, held in Washington last month, and an organizing committee is now making plans for the first meeting of the Association to be held some time next year, probably at Havana, Cuba, it was learned today at the Pan American Union.

The purposes of the new entity are "to establish and maintain relations between associations of lawyers, national and local, in the various countries of the Americas, to provide a forum for exchanges of views, to advance the science of jurisprudence in all its phases and particularly the study of comparative law." Also "to promote uniformity of commercial legislation, to further the diffusion of knowledge of the laws of the various countries throughout the Americas, and to encourage cordial intercourse among the lawyers of the Western Hemisphere."

United States organizations which have already signed up for membership in the Association are: American Bar Association, New York City Bar Association, American Foreign Law Association, Puerto Rican Bar Association, Missouri Bar Association, and Federal Bar Association.

Manuel Fernández Supervielles, Dean of the Bar Association of Habana, Cuba, is the Provisional President of the Association, and Mr. William Roy Vallance, of the State Department, the Provisional Secretary-General.

Lawyers and National Defense

THE Editorial in this issue on *"Lawyers and Their Home Communities"* should be read in connection with the following item. It is reprinted from THE RECORDER [the daily legal newspaper of San Francisco] for June 16, 1940.

Services of thousands of lawyers in any kind of work in which their special training and qualifications may be of use will be put at the disposal of the Government in the national defense program, if a resolution of the New York County Lawyers Association represents the views of the bar generally.

The resolution, offered by Edwin M. Otterbourg, chairman of the unauthorized practice of law committees of the American Bar Association and the New York County Lawyers Association, was adopted by the latter group's board of directors unanimously.

As announcement was made of the appointment of a special committee to act under the resolution, Terence J. McManus, secretary of the association, expressed the hope that this example would be followed by other bar organizations throughout the country.

Client Lawyer Reference Service

THE subject of a "Reference Service" for clients who have no lawyer and are seeking a satisfactory attorney has been receiving growing attention by the organized bar throughout the country. We have already carried stories about the matter, particularly about the work of the Chicago Bar Association in this field. We print herewith another news-worthy item which may be considered a bit of *res gestae* evidence showing what is being done on the Pacific coast. It is printed by special permission of the Los Angeles Bar Association, and appeared in the June issue of the "Bulletin" of that Association.

A REVISED LAWYERS REFERENCE SERVICE

Three years ago your Association established the "Experienced Lawyers List" in order to meet the demand of both professional and lay applicants who inquire at the office for reference to a lawyer. Under that plan only those members of the Association engaged in active practice for five years or more have been eligible for the list, and a small fee to cover printing and other costs has been charged to all members desiring to be listed. These past three years have demonstrated the usefulness of such a service to both the public and the members of the profession. Surprising have been the number of inquiries from laymen not acquainted with any lawyer. Surprising also is the report of many members who registered for the list, that the matters referred to them have proved to be "substantial."

Prospective clients requesting reference to a lawyer tend to fall within three general categories:

(1) Members of the profession seeking a specialist or a lawyer experienced in a particular field of the practice;

(2) Laymen of the lower income groups seeking a lawyer who is willing to serve them for a relatively low fee within their means; and

(3) Other laymen seeking a lawyer in a particular field.

Because it is felt that the old list has not been sufficiently representative of the membership of the Association and does not adequately meet the service demands of the three groups just mentioned, your Board of Trustees has concluded to open the registration to members of the Association *without* charge, to change the name of the service from "Experienced Lawyers List" to "Lawyers Reference Service," to extend the scope of the Service to meet the needs of all three groups of applicants, and to endeavor to make the revised service truly complete and representative by urging all members to fill out the enclosed "Registration Form" and mail it promptly to the office of the Association. (An additional copy of the "Registration Form" for your file is also enclosed.)

With the names of those lawyers who consent to assist in this work by receiving clients referred through

RESULTS OF ELECTION FOR STATE DELEGATES

ON June 8, 1940, the Board of Elections met at the Headquarters of the Association, canvassed the ballots, and announced the results of the balloting for State Delegates. In seventeen states delegates were elected for the regular three-year term beginning at the conclusion of the next Annual Meeting of the Association. Five of the same states also voted for delegates to fill vacancies in the term to expire at the conclusion of the 1940 Annual Meeting. Three jurisdictions voted for delegates to fill vacancies in the term to expire at the conclusion of the 1941 Annual Meeting.

In the twenty jurisdictions there were only three in which two or more candidates had been nominated by petition. Of those elected, seven succeed themselves. There were 10,642 ballots mailed to the members in good standing in the twenty jurisdictions, of which 4,318 ballots were returned. Because of the time required for transportation of mails to and from the Territorial Group, the time for closing the polls for voting in that jurisdiction was fixed at July 5, 1940. The results of the election to fill the vacancy in the Territorial Group will be announced later.

The official report of the results of the election is as follows:

ELECTION FOR DELEGATES—1940

Jurisdiction	*Nominees*	*Votes received*	*Total votes cast*
*Arkansas (Vacancy)	C. T. Cotham, Hot Springs	110	140
(Regular Term)	A. W. Dobyns, Little Rock	103	146
Colorado (Vacancy)	James A. Woods, Denver	139	148
(Regular Term)	James A. Woods, Denver	138	150
Delaware (Vacancy)	James R. Morford, Wilmington	29	33
(Regular Term)	James R. Morford, Wilmington	29	32
Georgia	Arthur G. Powell, Atlanta	211	231
Idaho	Oliver O. Haga, Boise	39	43
Indiana	Harold H. Bredell, Indianapolis	156	175
Louisiana	Charles E. Dunbar, Jr., New Orleans	216	231
Maryland	T. Scott Offutt, Towson	259	269
Minnesota	Morris B. Mitchell, Minneapolis	232	251
Nevada	Charles A. Cantwell, Reno	46	50
*New Hampshire	Louis E. Wyman, Manchester	44	74
New Mexico (Vacancy)	H. A. Kiker, Santa Fe	51	58
*New York	George H. Bond, Syracuse	1,014	1,419
Ohio	Charles W. Racine, Toledo	471	506
Oregon	Sidney Teiser, Portland	97	114
Rhode Island (Vacancy)	Chauncey E. Wheeler, Providence	110	113
(Regular Term)	Chauncey E. Wheeler, Providence	110	113
Utah	Robert L. Judd, Salt Lake City	75	81
West Virginia (Vacancy)	Frank C. Haymond, Fairmont	120	130
(Regular Term)	Frank C. Haymond, Fairmont	124	133
Wisconsin (Vacancy)	Otto A. Oestreich, Janesville	233	241
			4,318

*States in which there was more than one nominee by petition.

BOARD OF ELECTIONS
EDWARD T. FAIRCHILD, CHAIRMAN.

the Lawyers Reference Service, the Executive Secretary will prepare three card indexes:

(a) One to be used exclusively for references in response to inquiries from members of the profession, and to be compiled from the information given under items (19), (20), (12) and (13) of the "Registration Form";

(b) A *second* index to be compiled from the information given under items (22), (16), (17), (18) and (21), and to be used exclusively for references in response to inquiries from those lay applicants of small means who must have a lawyer willing to serve them for a relatively small fee; and

(c) A *third* index to be used in handling the inquiries of all other lay applicants, and to be compiled from the information given under items (16), (17), (18) and (21).

The names of many members will, of course, appear in all three indexes, others in only two, and some in only one. For obvious reasons, registration of any one member in each index will be limited to four fields of the practice. Each index will be classified according to the fields represented. The information given under items (14) and (15) will also be carried on to the cards in each index.

The mechanics for the operation of the service are described in the rules which are printed on the back page of the "Registration Form." It is believed that this system will give the lay-applicant the widest practicable latitude in choosing his own lawyer, and at the same time provide an equitable method of rotating the references among the members of the Association.

Your Board of Trustees hopes that each of you will cooperate to insure the fullest success of the Service by filling in the "Registration Form" and returning it now; by reporting to the Executive Secretary any suggestions that may occur to you for improvement of the Service; and by keeping a record of all matters referred to you through the office of the Association, to the end that your Trustees may thus be enabled to compile from time to time an accurate report to the membership of the workings of the Lawyers Reference Service.

June, 1940.

Municipal Law Section

A MUCH LARGER attendance than usual is expected at the annual meetings and luncheon of the Municipal Law Section which will be held in Philadelphia on Tuesday, September 10th. The program includes speakers of national reputation on subjects of broad interest not only to municipal lawyers, but also to all members of the bar. Philadelphia is easy of access to the large number of lawyers representing the local governments of the eastern and central states.

At the annual Section luncheon, which will be held in the Bellevue-Stratford Hotel, Mayor LaGuardia of New York City has consented to be the guest speaker. Mr. LaGuardia is a lawyer, has been a member of Congress, is Mayor of the largest city, and is always a very interesting speaker. The luncheon will be held jointly with the Commercial Law Section and will be presided over by Mayor Chandler of Memphis, chairman of the Municipal Law Section, and Mr. Jacob M. Lashly of St. Louis, who is chairman of the Commerial Law Section and the nominee for president of the American Bar Association.

The principal event of our forenoon session will be what is in effect a debate between Arthur A. Ballantine of New York City and Louis Brownlow of Chicago on the phase of local government of greatest general interest at the present time: "Federal municipal relationships: the legal effect of Federal grants-in-aid on local self government." Mr. Ballantine was Under-secretary of the U. S. Treasury under President Hoover, and has since kept himself very fully informed as to the subject. Louis Brownlow is widely known throughout the country as an effective speaker and for his knowledge of local and federal government. He has been chairman of the President's Committee on Administrative Management—the committee for reorganization of the governmental departments and agencies—and has long been director of the Public Administration Clearing House which includes the group of governmental organizations having their headquarters at 1313 East 60th St., Chicago. Among these organizations are the American Municipal Association, the Council of State Governments, and the Municipal Finance Officers Association of the United States and Canada. The speakers have expressly reserved to themselves the right to discuss the subject broadly, so that the debate will be of interest to all lawyers, whether or not they are directly connected with governmental affairs. Following the principal speakers, there will be full opportunity for general discussion.

During the afternoon session also, there will be topics of broad interest. William C. Chanler, corporation counsel of New York City will discuss "the interstate commerce clause and local municipal taxes." Recent decisions have caused this subject to be much discussed among all members of the bar and in view of expanding tax needs, the subject will continue to be of great interest. All who have heard Mr. Chandler know that he is a very effective and interesting speaker.

Another afternoon topic is the "Selection of public law officers by competitive examination." This includes the improvement of the administration of civil service. In accordance with the action taken by the Section at the meeting in San Francisco of last year, the Section is proposing to the House of Delegates of the Association the following resolution:

RESOLVED, that, in the opinion of this Association, it is both practicable and desirable that lawyers in public positions, including examiners and staff of administrative agencies, but not including elective and policy determining heads, be employed under the merit system with the aid of competitive examinations and that this Association further such method of selection."

Murray Seasongood, well known exmayor of Cincinnati, will speak to the resolution. There will be an eminent speaker in opposition, followed by general discussion.

Arnold Frye,
Secretary.

Martin J. Teigan Law List Secretary, Dies

Martin J. Teigan, secretary of the special committee on law lists of the American Bar Association died June 24th, after an illness of two weeks. Mr. Teigan was born at Forest City, Ia., Aug. 25, 1886. He studied law at Valparaiso university, receiving a LL.B. degree in 1911. He was admitted to the Illinois bar in 1912 and practiced in Chicago since that time.

English Law Reporting

The London Letter, in this issue, suggests the sharp contast between Law Reporting in England and America. Here the so-called Reporter System, which has long covered the entire country, has been given unofficial recognition. It is a private venture whose policies and methods and traditions (they ae high) are entirely under pivate control. In England The Council on Law Reporting is an incorpoated organization ,whose members and staff are selected entirely by the Bar. Its policies and traditions and methods are therefore within the control of the profession itself.

In 1903 Sir Frederick Pollock (he was at the time the chief "Editor of the Law Reports" for England) read a paper on "English Law Reporting" before the American Bar Association.[1] He stresses the point that in England "reporting" of cases is a very real task, compared to America. Speaking of the methods used in his office, Pollock says:

> "As to the matter of reports, there is no fixed rule for deciding what cases are to be published. Utility to the profession is the only test. We do not necessarily report a decision because it is written, still less omit to report it because it is delivered off-hand."

The matter of *selection* of cases to be reported is therefore a reality in England. With us the matter is left entirely to the private publisher. Consequently, *all cases* are reported, the frivolous and worthless ones on a par with the important ones. Indeed the very cases which the court directs "not to be officially reported," are nevertheless printed in full, along-side the worth-while cases. The answer of the publishers is: "The Lawyers want them."

Pollock refers to oral opinions in England and says:

> "The reporting of arguments and of oral judgments is the most skilled and difficult part of an English Reporter's task. Arguments have to be exhibited fully enough to explain the points made, the line of reasoning, and the authorities relied on, but not at superfluous length."

With us in America the task of the Reporter is, in comparison, simple and almost mechanical, in all its aspects. The particular court furnishes the Reporter a complete typewritten statement, comprising the opinion and all other matter involved in the case. The Reporter merely "edits" such statement, and adds the so-called Syllabi, or Digest-Paragraphs.

Pollock pays a due tribute to the business of Law Reporting when he says:

> "Our work is quite unknown to the general public . . . and even to a large number of the profession. . . Nevertheless you know and we know that we are about a work the English speaking world cannot do without. In our modest and ministerial field of operation we are helping to maintain a national and a more than national heritage, the ancient and still vital growth of the common law."

As this note is written, the question in many minds is whether the English Nation is about to be overthrown. We hope profoundly that it will survive, as it has against all past dangers. But if it does not, then what about "Law Reporting in England?" What about the survival of the Common Law itself?

U. A. L.

1. A.B.A. Report, 1903, p. 363.

NEWS OF THE BAR ASSOCIATIONS

Bar Association of Arkansas

THE annual convention of the Bar Association of Arkansas was held at Hot Springs National Park, Arkansas, at the Arlington Hotel, on May 3 and 4, 1940. This was the forty-third consecutive annual meeting.

The meeting convened at 10:00 A.M., May 3, with James D. Head of Texarkana, Chairman of the Executive Committee, presiding. After the invocation, address of welcome, and response, President Harvey T. Harrison, of Little Rock, delivered his address, "The Lawyer's Job." After the transaction of morning business, the meeting adjourned until 1:00 P.M., at which time the Junior Bar Section of the State Association met and was presided over by Cooper Land, of Hot Springs, the retiring President of the Junior Section. The following new Junior Section officers were elected: E. A. Matthews, Little Rock, Chairman; John L. Daggett, Marianna, Vice-Chairman; and Dennis K. Williams, Texarkana, Secretary.

At 2:00 P.M. the regular meeting resumed with an address by the Hon. Burt J. Thompson, of Forest City, Iowa, on "Legal Institutes for Local Lawyers." After this very interesting discussion, the Association voted to sponsor such a program for the next convention. Then followed a very informative speech by the Hon. Adrian Williamson, of Monticello, Arkansas, who is Chairman of a special committee of the State Association on Revision of Arkansas Probate Law, on this subject.

A well-attended banquet was held at the hotel that night, the President presiding as toastmaster, and the feature address being a most entertaining one upon the subject "As Follows To-Wit," delivered by the Hon. Harry E. Meek, President of the Little Rock Bar Association.

The convention resumed the morning of May 4, with an address by the Hon. Marcus L. Bell, of New York, Vice-President and General Counsel for the Chicago-Rock Island and Pacific Railway Company, entitled "New Wine." The association then settled down to its regular business, and a number of well-considered committee reports were read and received. A new constitution, prepared by a special committee, was read and adopted by the Association. The meeting closed with the election of officers for the ensuing year. The following were unanimously elected: N. J. Gantt, Jr., Pine Bluff, President; Henry Moore, Jr., Texarkana, Vice-President; and Roscoe R. Lynn, Little Rock, Secretary. The only retiring officer is Harvey T. Harrison, the new President having been Vice-President for the past year, and the Secretary having been continued in office.

TERRELL MARSHALL,
Executive Secretary.

ALBERT J. HARNO
President, Illinois State Bar Association

Illinois State Bar Association

CEREMONIES in honor of its members admitted to the bar of Illinois for fifty years or more, the annual dinner address by Federal Judge Merrill E. Otis, Kansas City, and a number of innovations in bar association program presentation provided by the section organizations combined to make a most attractive program for the sixty-fourth annual meeting of the Illinois State Bar Association held in Springfield on June 11, 12, and 13. The Association of Wives of Illinois Lawyers, state bar auxiliary organization, held its annual meeting at the same time and place.

Following the annual meeting of the Board of Governors on the afternoon of June 11, the convention opened with an unusual type of program featuring questions and answers on practice under the new Illinois Probate act which became effective on January 1 of this year. William M. James, Chicago, chairman of the section on probate and trust law, turned the tables on his audience by starting his program with a true-false examination covering forty questions on Illinois probate procedure. Each person present checked his own responses to the questions submitted, and then graded himself as the correct answers were given. This was followed by a period of general questions and answers from the floor.

On the evening of June 11, the section on civil practice and procedure provided another program innovation with its demonstration of pre-trial practice conferences. Following opening discussions by Circuit Judge Victor Hemphill, Carlinville, and Circuit Judge Joseph E. Daily, Peoria, Judge Walter J. LaBuy, Chicago, who presides over the pre-trial calendar in the Circuit court of Cook county, conducted three typical pre-trial conferences using actual cases from his courts, with Albert E. Jenner Jr., Chicago, chairman of the section, and Thomas L. Owens, Chicago, taking the parts of opposing counsel in the cases considered. This practical and informative demonstration was one of the high points of the convention program.

The opening business session of the meeting was held on the morning of June 12, in the Sangamon County Circuit court room, in the building formerly used as the state capitol building of Illinois. This room is historically significant as being the former chambers of the Illinois house of representatives in which Abraham Lincoln served his last term in the Illinois legislature, the scene of Lincoln's "House Divided" address and many of the important informal debates between Lincoln and Stephen A. Douglas, and the room in which the body of Lincoln lay in state on its return from Washington following the assassination.

This morning business session was devoted entirely to the annual address by the president of the Association, Charles O. Rundall, Chicago, the reports of the officers, committees, and sections, and a number of items of administrative business. The traditional law school alumni luncheons followed the morning session as one of the important features of the social program of the convention.

Beginning on Wednesday afternoon, June 12, and continuing through until the ceremonies in honor of veterans on Thursday morning, June 13, the general program of the convention was provided by the various sections of the Illinois State Bar Association. Six sections contributed to this general program, providing still further interest-

ing developments in bar association meeting presentations.

A departure from the stereotyped form of discussion opened the afternoon program on June 12 when the section on real estate law turned to dramatics for the presentation of the salient features of its proposed revision of Illinois mortgage laws. In "The Mortgage of Tomorrow," a two-act play written and directed by Paul W. Gordon, Springfield, secretary of the section, members of this group enacted a typical court room scene illustrating the changes in mortgage practice and procedure that may be brought about in Illinois by adoption of the proposed Illinois mortgage act. Floyd E. Thompson, Chicago, concluded the presentation with a brief discussion of the need for this revision and the merits of the proposed act.

The balance of the afternoon program was provided by the section on commercial law, represented by Charles True Adams, Chicago, in a discussion on corporate reorganizations under the present bankruptcy laws, and the section on administrative law, represented by Walter F. Dodd, Chicago, who discussed the problem of adapting state appellate practice and procedure to provide for adequate disposition of appeals from state administrative tribunals.

Federal Judge Merrill E. Otis, Kansas City, was the only speaker on the program for the annual dinner, held on the evening of June 12. Speaking on "The Trial and Death of Socrates," Judge Otis retold this story from Grecian history that has many pertinent parallels in modern trends in law and government. Members of the Seventh Circuit Court of Appeals and Federal District judges sitting in Illinois were special guests of honor on this occasion.

On Thursday morning, June 13, the section on legal history and biography, of which James G. Skinner, Chicago, is chairman, held the second of its annual breakfast meetings with Logan Hay, Springfield, speaking on Abraham Lincoln and the Supreme Court of Illinois, and Cairo A. Trimble, Princeton, discussing cases in Illinois Supreme Court history relating to slavery litigation. This section has been engaged for some time in the compilation of materials for a comprehensive history of the bench and bar of Illinois, with particular emphasis upon the history of the State Supreme Court.

Continuing the discussion program provided by the section organizations, the section on probate and trust law returned on Thursday morning to present Morton John Barnard, Chicago, in a discussion of Illinois probate practice relating to accounts, claims, and appeals, in the form of institute type discussions. Deneen A. Watson, Chicago, chairman of the section on taxation, concluded this program with a discussion of tax legislation proposed for the 1941 state legislative session.

In the final portion of the convention program, on the morning of June 13, President Charles O. Rundall, Chicago, presided over the ceremonies in honor of members of the Illinois State Bar Association who have been admitted to the bar of Illinois for a period of fifty years or more. The title of "Senior Counsellor" was conferred upon these veterans, and an appropriate certificate commemorating the recognition and the occasion was presented to each member so honored. It is planned to continue these ceremonies as a regular feature of succeeding annual meetings of the Association.

Among the 127 members of the Illinois State Bar Association in this group were Joseph W. Rickert, Waterloo, oldest lawyer in active practice in the United States, who will be one hundred years old this month; Thomas M. Hoyne, Chicago, dean of the Illinois bar in point of service by virtue of his admission to the bar in the year 1865; two recipients of the American Bar Association Award for distinguished service, Dean Emeritus John H. Wigmore, Chicago, and Edgar B. Tolman, Chicago, editor-in-chief of the AMERICAN BAR ASSOCIATION JOURNAL; and Silas H. Strawn, Chicago, former president of the American and Illinois State Bar associations. Mr. Tolman, who is also a former president of the Illinois State Bar Association, extended the greeting on behalf of the members of the bar at the luncheon in honor of the class of young lawyers admitted to the Illinois bar on June 13, immediately following adjournment of the convention.

The meeting of the Association of Wives of Illinois Lawyers, at which Mrs. Charles O. Rundall, Evanston, president, presided, featured a model trial conducted as a demonstration of jury service for women. Circuit Judge Walter W. Wright, Jacksonville, president of the Circuit Judges Association of Illinois, served as presiding judge, assisted by Adolph A. Rubinson and Robert McClory, both of Chicago, as attornies, with Mrs. Albert J. Harno, Urbana, and Mrs. Benjamin F. Langworthy, Chicago, taking the parts of plaintiff and defendant. The model trial was arranged by Mr. Rubinson, state director of the public information program of the American Bar Association Junior Bar Conference.

Officers of the Illinois State Bar Association elected and installed at this time include: Albert J. Harno, Urbana, president; Benjamin Wham, Chicago, first vice-president; Charles E. Feirich, Carbondale, second vice-president; Warren B. Buckley, Chicago, third vice-president; R. Allan Stephens, Springfield, re-elected secretary; Alvin C. Margrave, Springfield, re-elected treasurer; and Benjamin F. Langworthy and F. Howard Eldridge, both of Chicago, elected to the Board of Governors for three-year terms. Clarence W. Heyl, Peoria; Cairo A. Trimble, Princeton; and President Harno were elected Illinois State Bar Association delegates to the American Bar Association House of Delegates, for terms beginning at the adjournment of the 1940 annual meeting in Philadelphia.

Officers of the Association of Wives of Illinois Lawyers elected at this time include: Mrs. Albert J. Harno, Urbana, president; Mrs. Benjamin Wham, Chicago, vice-president; Mrs. Robert A. Stephens Jr., Springfield, re-elected secretary; and Mrs. Alvin C. Margrave, Springfield, re-elected treasurer.

R. ALLEN STEPHENS
Secretary

Bar Association of the State of Kansas

Kay-Hart, N.Y.

W. E. STANLEY
President, Bar Association of the State of Kansas

THE Bar Association of the State of Kansas, now having the largest membership in its history, held its fifty-eighth annual meeting in Wichita, Kansas on May 24 and 25. The registration for the meeting surpassed all previous records. Mr. W. E. Stanley of Wichita was elected President for the coming year. Mr. B. L. Sheridan of Paola

(under changes made in the constitution) was elected President-Elect and will take over the presidency at the next meeting. Mr. Charles D. Welch of Coffeyville was elected Vice President and Robert M. Clark of Topeka re-elected Secretary-Treasurer.

Mr. Stanley has practiced law in Wichita for over twenty-six years. He served as Secretary of the Kansas Bar Association from 1920 to 1928. He is a delegate to the American Bar Association and has been active for many years in the American Bar, the American Law Institute and other affiliated organizations.

Two and a half days of the meeting were devoted to sectional discussions arranged by the Committee on Sections. Friday morning there were sectional discussions on probate and title work and on taxation, and on Saturday afternoon discussions on insurance, trial practice and mineral law—oil and gas. The section meetings were well attended.

On Friday noon the Washburn and Kansas University Law School Alumni luncheons were held.

On Friday evening at the fifty-eighth annual banquet of the Association, the Association was fortunate in having the privilege of being addressed by three distinguished members of the Bench and Bar. Justice Harry K. Allen of the Kansas Supreme Court spoke on the subject, "The Supreme Court." Honorable William L. Vandeventer of Springfield, Mo., gave a very humorous discourse on "The Doctor and the Lawyer (A Comparative Analysis)." Honorable Walter A. Huxman, Judge of the Federal Circuit Court of Appeals, Tenth Circuit, spoke on the subject, "The Bench and the Bar."

On Saturday morning Ralph R. Quillian of Atlanta, Georgia, Chairman of the American Bar Committee on American Citizenship and Councilman of the Junior Bar Conference, gave a very enlightening and interesting address on "The Heritage of the American Lawyer." Mr. Drane Lester, Inspector for the Federal Bureau of Investigation of Washington, D. C., spoke on the activities of the F.B.I. under the subject, "The Modern Criminal."

The highlights of the social activities were the luncheon sponsored by the Wichita Association Saturday noon and the stag show prepared and presented by members of the Wichita Bar at the Arcadia Theater. The stag show was entitled "Barzapoppin" and was in the nature of a follies and frying pan. The stag shows put on by the Wichita and Topeka members for the past several years have done much to stir up enthusiasm and increase attendance at the annual meetings.

The meeting was saddened by the death of the retiring president, Ralph T. O'Neil of Topeka a few hours after he had turned the gavel over to the new president. He succumbed to a heart attack while he, with some thirty-five of his most intimate friends, was attending a dinner at the Stanley home. Mr. O'Neil was very active in the affairs of the Kansas and American Bar Associations and was past Commander of the American Legion.

ROBERT M. CLARK,
Secretary-Treasurer.

Louisiana State Bar Association

Kay-Hart, N.Y.
PIKE HALL, JR.,
President, Louisiana State Bar Association

THE forty-third annual meeting of the Louisiana State Bar Association was held in the Louisiana State Exhibit Building in Shreveport, Friday and Saturday, April 26 and 27, 1940. The meeting was very well attended. Eugene Stanley, President, of New Orleans, called the convention to order and gave a resume of the Association's activities through his term of office.

The outstanding features of the 1940 annual meeting were, first, the adoption by unanimous vote of the resolution of the Executive Committee of the Association urging repeal of the State Bar Act now in existence in Louisiana and second, the approval by the Association of an integrated bar in Louisiana, including the proposed act to integrate the bar. In the proposed act, the Supreme Court is memorialized to exercise its inherent powers by providing for the organization and regulation of the Louisiana State Bar Association; by providing rules and regulations concerning admissions to the Bar, the conduct and activities of the Association and its members; and by providing a schedule of membership dues, the non-payment of which shall be grounds for suspension, and by providing for the discipline, suspension or disbarment of its members, etc. This bill has already been introduced in the 1940 Legislature.

Honorable Walter P. Armstrong of Memphis, Member of House of Delegates of the American Bar Association, was the guest speaker and spoke on the topic, "The Lawyer Faces the Future." Mr. Armstrong's address showed thought and care, was well delivered and proved interesting and instructive.

John H. Tucker, Jr., of the Shreveport Bar, addressed the Association on "The Work of the Louisiana State Law Institute." The Louisiana State Law Institute was recently created by an act of the Legislature. Mr. Tucker is the President of the Institute.

Another address that proved of interest and instructiveness was by Paul G. Borron, Jr., of Plaquemine on "Sugar Legislation." The members present, and particularly those interested in the subject were enthusiastic over the amount of help to be derived from Mr. Borron's address.

The address of welcome on behalf of the City of Shreveport was made by Sam Caldwell, Mayor. The address of welcome on behalf of the Shreveport Bar Association was made by Milton C. Trichel, Jr., of Shreveport. Response on behalf of the visiting delegates was made by Frank B. Ellis of Covington.

The officers elected for 1940-1941 under the 1939 amendment to the charter are: Pike Hall, President, Shreveport; Henry P. Dart, Jr., Vice-President, New Orleans; and W. W. Young, Secretary-Treasurer, New Orleans.

Cleveland Bar Association

A FOUR years' study by the Cleveland Bar Association of the problems which have been created in Ohio by the establishment of administrative agencies terminated in May when Cary R. Alburn, Chairman of the Administrative Law Committee, presented to the Executive Committee a report. This report proposes an amendment to the Constitution of the State of Ohio so as to give the Ohio Courts of Appeals revisory jurisdiction of the proceedings of administrative officers that may be conferred by law. Judgments of the Courts of Appeals shall be final in all cases as heretofore has been provided except in cases involving questions arising under the Constitution of the United States or this State, cases of felony,

cases in which it has original jurisdiction and cases of public or great general interest in which the Supreme Court may direct any Court of Appeals to certify its record to that Court.

The Cleveland Committee, when and if the Constitutional amendment is adopted, will cooperate with the State Bar Committee in preparing a uniform administrative law bill for the State. Members of the Bar Committee cooperating with Alburn are John W. Barkley, Grace Berger, Ralph J. Bishop, Jr., Rufus Day, Jr., Alfred Kelley, Harold C. Lumb, Charles Auerbach, A. M. VanDuzer and Alfred Lawrence.

The work of the Committee centered on two major problems:

1. Uniform rules of practice and uniform method of reviewing determinations of Administrative Agencies;
2. Reduction of the number of appeals from determinations of Administrative Agencies in any given case.

The Committee declared "that such legislation is timely is indicated by the fact that there are now 130 different Federal Administrative Agencies and by the latest statistics showing approximately 850,000 civilian officers and employees of the Federal Administrative Service, while in Ohio there are over eighty administrative boards and commissions." A study by the Committee of a number of the more important of these administrative agencies reveals a wide diversity as to rules of practice and rights and methods of review.

The Committee asserted that the problem of unifying rules of practice and methods of review of our administrative agencies in Ohio is a matter of state-wide interest, and in October 1939 so advised the President of the Ohio State Bar Association and that organization has appointed an Administrative Law Committee. Attorney Earl R. Hoover of Cleveland is chairman and Joseph M. Poe of Cleveland is secretary of such committee.

One great advantage to the practicing bar that would follow from the adoption of this amendment would be that of relieving the Supreme Court of Ohio of a great mass of reviews that are taken direct from important commissions to the Supreme Court. Thus the Court would be given more time to deal with law suits involving important principles of law.

A complete revision of the rules of the United States District Court for the Northern District of Ohio dealing with bankruptcy has been prepared by Referee Carl D. Friebolin with the assistance of the Committee on Bankruptcy of the Cleveland Bar Association. The rules have been approved by the Executive Committee of the Association and have been presented to the United States District Judges, Paul Jones and Robert N. Wilkin.

One other revision, possibly two, have been made in other districts by Bar Committees in cooperation with Referees in Bankruptcy. Such a revision has been worked out by the Bar of New York City.

The new rules have been submitted by the Federal Judges to the Department of Justice at Washington, D. C. for approval prior to being adopted by the United States District Court, Northern District of Ohio. It is proposed to print the rules when finally adopted and distribute them among the members of the Bar. There are rules dealing with petitions and schedules; deposit for fees and expenses; partnerships; receivers; powers of attorney—voting; bonds, inventory men, auctioneers and appraisers—appointment and compensation; sales; record of real estate proceedings and payment of fees for same; reclamation; discharge; dismissal of proceedings and vacation of adjudication; compensation of attorneys; indemnity for expenses of the referee; assignment of dividend—waiver; final dividends—duty of trustee; reviews; rules of referees; and application of rules.

Mr. Friebolin has been a Referee in Cleveland for twenty-five years. He, as a member of the Committee of twelve representing the entire Bar, made the original draft of the Chandler Act which was finally acted on by the Committee. Referee Fred H. Kruse, of Toledo, made valuable suggestions during the right writing of the rules for the Northern Ohio District.

The Association has decided to renew its request of Congress to enact legislation at its next session providing for an additional judge in the United States District Court, Northern District of Ohio. This is because of the large increase of litigation in the District.